TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 580.

THE UNITED STATES, APPELLANT,

vs.

CONRAD HEINSZEN AND GUSTAV BROCKMANN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 25, 1907.

(20545.)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 580.

THE UNITED STATES, APPELLANT,

vs.

CONRAD HEINSZEN AND GUSTAV BROCKMANN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed July 1, 1902	1	1
Amended petition, filed August 20, 1906	11	6
Schedule showing dates of payment, etc	21	11
Demurrer, filed August 23, 1906	22	12
Opinion of the court overruling the demurrer, filed January 7, 1907	23	13
Traverse, filed January 22, 1907	31	21
Submission of case, January 22, 1907	32	21
Findings of fact and conclusion of law, filed January 23, 1907, on stipulation of parties	33	21
Appendix—Customs Tariff and Regulations	40	25
Judgment of the court, January 23, 1907	96	83
Application for, and allowance of, appeal	97	83
Certificate of the clerk	98	83

1 I.—*Original petition, filed July 1, 1902.*

Philippine Import Duties. Claim No. . Imports from U. S.

In the United States Court of Claims, Term 1901–1902.

CONRAD HEINSZEN AND GUSTAV BROCKMANN, trading as partners under the firm name of C. Heinszen & Co., claimants,
vs.
THE UNITED STATES.
} No. 29914.

Action No. 1.

PETITION.

Conrad Heinszen and Gustav Brockmann, trading as partners, under the firm name of C. Heinszen & Co., by Henry M. Ward, their attorney, the claimant above named, for their petition against the United States, respectfully show to the court and allege as follows:

1. At all the times hereinafter mentioned, your petitioners were and now are engaged in a general trading and mercantile business at the port of Manila, in the island of Luzon, in the Philippine Islands, and were and now are subjects of the Emperor of Germany.

2 2. The names set forth above in the title of this action the full and true names and style of your petitioners.

3. On the 10th day of December, 1898, a treaty of peace between the United States of America and the Kingdom of Spain was concluded and signed by their respective plenipotentiaries at Paris, in the French Republic. Said treaty was ratified by the Senate and by the President of the United States on the 6th day of February, 1899, and by Her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the city of Washington, in the District of Columbia, on the 11th day of April, 1899, and on the same day the said treaty was proclaimed by the President of the United States.

4. At the date of the ratification of said treaty, the military and naval forces of the United States had taken, occupied, and were in possession of the town and port of Manila, in the island of Luzon. Under and pursuant to the terms of said treaty, the said island of Luzon, , being part of the archipelago known as the Philippine Islands, was ceded by Spain to the United States, the rightful possession thereof recognized, and such cession accepted by the United States. By said treaty Spain promised and agreed that it would evacuate the territory so ceded by it, which it thereupon proceeded to do. At all times thereafter said island of Luzon, and particularly the said town and port of Manila, in said island, have remained in the complete possession of the United States without interference by Spain or by any other power, and the United

States has, since the date of the signing of said treaty, exercised full administrative and legislative authority over said town and port of Manila.

3 5. Prior to the date of the signing of the said treaty of peace the President of the United States made and issued a certain Executive order, dated at the Executive Mansion, in the city of Washington, July 12th, 1898, and published by the Secretary of War by order of the President on the 13th day of July, 1898. The said order provided in substance that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, duties and taxes should be levied and collected upon articles imported into the Philippine Islands from other countries and upon articles exported from the Philippine Islands to other countries at the rates and in the manner and subject to the regulations set forth and established by the Customs Tariff and Regulations for the Philippine Islands thereunto annexed.

Thereafter, by order of the Secretary of War, dated at the War Department, Washington, October 13th, 1898, and known as "Tariff circular No. 18," it was ordered that the operation of said order of the President of July 12th, 1898, establishing a Customs Tariff and Regulations for ports in the Philippine Islands should be suspended until the 10th day of November, 1898, when the same should take effect and be in force, and that until that time the Spanish tariff as theretofore in force should be in force and duties collected thereunder. In accordance with the last-named order, on and after November 10th, 1898, the said tariff and regulations were put in force at the various ports of entry in the Philippine Islands, and more particularly at the said port of Manila, in the island of Luzon . The said Customs Tariff and Regulations so established by the said order of the President of July 12th, 1898, as modified by certain amendments thereof made by order of the President from time to time, remained in force at all the ports of entry in the Philippine Islands, and more particularly at the said port of Manila from

4 on or about the 10th day of November, 1898, until on or about the 15th day of November, 1901. During all of that period import duties were collected under the alleged authority of said orders and of said tariff by the military authorities of the United States upon merchandise imported and brought into the several ports of entry in the Philippine Islands from the several States and Territories of the United States, as well as upon merchandise imported from foreign countries.

6. Said Customs Tariff and Regulations for the Philippine Islands provided, among other things, that every vessel on its arrival should be placed under military guard until duly discharged, and that no merchandise should be delivered until after the payment of the proper duties and charges thereon, when an order for the delivery of the merchandise should be issued by the proper military officer, and that any objection to the assessment of the duties must be filed by the importer before payment by him of the same, and that no refund of

duties would be made thereafter, and that no delivery of imported merchandise should be made to the importer unless he had duly paid in cash the duties assessed thereon, and that any goods, wares, or merchandise not duly entered for payment of duty within ninety days after importation should be sold at auction by order of the commanding officer, and that the proceeds of such sale should be retained for ten days subject to the demand of the importer, after deduction of the proper duties on the goods and all expenses of storage and sale, and that all seized and confiscated goods should be sold in like manner.

The said Customs Tariff set forth the rates of duties on imports in certain schedules annexed thereto, and your petitioners beg leave to refer to the said Customs Tariff and Regulations as established by the said orders of the President and to the amendments thereof, and to make the same a part of this petition as fully to all intents and purposes as if herein set forth at large.

5 7. During the said period from November 10th, 1898, until November 15th, 1901, certain officers of the United States Army were designated under orders of the President or of their military superiors to act, and did act as collectors of customs at the several ports in the Philippine Islands, and particularly at the said port of Manila and enforced the said tariff and regulations as originally established and as amended from time to time upon and with respect to merchandise imported and brought into the ports in the Philippine Islands, and more particularly the said port of Manila from the several States of the United States, and collected duties thereunder upon such merchandise imported from the several States, at the same rates and in the same manner as upon and with respect to merchandise imported into said Philippine ports and more particularly said port of Manila from foreign countries.

8. At all the times herein referred to and long prior thereto your petitioner engaged in the business of a general mercantile and trading house in the said port of Manila and other Philippine ports, having correspondents in the city of New York, State of New York, and in many of the principal ports in other States of the United States, and in other countries, and in the usual and ordinary course of said business your petitioner imported a large quantity of merchandise, from the several States of the United States into the said port of Manila, all of which merchandise was the growth, produce, or manufacture of one or more of the several States, or if of the growth, produce, or manufacture of any foreign country had been entered at one of the ports of entry within the several States and lawful duties had been paid thereon prior to its shipment to the Philippine Islands.

6 9. At various times after the issuance of the various orders herein above set forth, upon the arrival at the said port of Manila of such merchandise, imported by and consigned to your petitioner from the several States of the United States, the

military officer of the United States then acting as collector of customs, and the subordinate military officers acting under his orders took possession of such merchandise and placed the same under military guard, in the manner prescribed in and by said Customs Tariff and Regulations in respect to merchandise imported into the Philippines from foreign countries, and proceeded to assess and levy duties thereon at the rates therein established, and refused to deliver possession of the same to your petitioner until after the payment in cash of the duties so assessed and levied, and threatened in the event of the default in the payment of such duties to seize such merchandise with the military forces at their command and to sell the same for the payment of the duties so levied by them in the manner prescribed in and by said Customs Tariff and Regulations. Your petitioners were thereupon obliged and compelled to pay, and did pay to the military officer then acting as collector of customs the amount of duties so assessed by him but under duress, and in order to obtain possession of their said merchandise, and in order to carry on their business as aforesaid and to prevent the interruption and destruction of their said business, and upon such payment the said merchandise was released from the custody of said military authorities and delivered to your petitioner .

10. Your petitioners beg leave to file hereafter and annex hereto and make a part of this petition a schedule marked "A," showing in detail the respective dates of payment of duties, numbers of customs receipts given by the military officers upon payment, names of steamers in which such merchandise was imported, invoice numbers, ports from which such merchandise was shipped, and amounts
7 of payments of duties by your petitioner from April 11, 1899, to June 30, 1902, and your petitioner beg leave of this honorable court to file hereafter with like force and effect as if filed herewith a supplemental schedule, or schedules, giving like particulars of all payments of duties made by your petitioner , up to the date of the filing thereof and to make the same a part of this petition. The amount of duties so paid by your petitioner during the period therein referred to is the sum of one hundred thousand dollars ($100,000) gold.

11. The several military officers of the United States acting as collectors of customs as aforesaid paid over the several amounts of duties so collected by them from your petitioner as aforesaid to the United States, and the whole amount of such duties is now held by the United States, and no part thereof has ever been repaid to your petitioners.

12. The Government of Germany, of which country your petitioners are subjects, accords to citizens of the United States the right to prosecute claims against such Government in its courts as fully as they are allowed by law to prosecute them against the Government of the United States, and in such cases judgment may be recovered against Germany according to the nature and extent of the relief to which the suitor is entitled.

13. As your petitioners are advised by counsel, the proper construction of the said order of the President of July 12th, 1898, and of the Customs Tariff and Regulations thereby established, as amended from time to time, is that they ceased to apply to all articles
8 imported and brought into the several ports in the Philippine Islands, and more particularly the port of Manila from the several States of the United States, at the moment the United States ceased to be a foreign country with respect to the Philippine Islands: that is to say, on December the 10th, 1898, the date when the said treaty of peace was signed. And that all the merchandise so imported by your petitioners into said port of Manila , was not subject to any import duties, and was entitled to free entry into the said port.

14. As your petitioners are advised by counsel, the imposition and collection of said duties upon merchandise imported by your petitioner at the port of Manila as aforesaid were in violation of the rights and privileges secured to your petitioners as subjects of the Emperor of Germany, under and by virtue of the provisions of the Constitution of the United States and of the treaties between the United States and Germany and the laws of the United States, and the collection of such import duties by the military authorities as aforesaid in the amounts specified in said schedules, or in any other amount, is unauthorized, illegal, and in violation of the laws and Constitution of the United States and the treaties between the United States and Germany, and the petitioners claim that they are entitled to recover said moneys from the United States, and base their claim thereto upon the United States Constitution and the said treaties and the laws of the United States.

15. No part of the moneys so paid by your petitioner to the United States as aforesaid has ever been repaid by the United States, or any officer thereof, although payment thereof has been demanded.

And by reason of the facts aforesaid the sum of one hundred
9 thousand dollars gold ($100,000) so paid by the petitioners to the United States, is now due to and owing the petitioner from the United States.

Wherefore, the petitioner demands judgment against the United States for the sum of one hundred and twenty-five thousand dollars ($125,000), and all proper relief in the premises.

HENRY M. WARD,
Attorney of Record for Claimant,
32 Nassau Street, New York City.

10 STATE OF NEW YORK,
County of New York, ss:

Edgar Viegelmann, being duly sworn, deposes and says that he is employed by the firm of C. Heinszen & Co. and has been at their Manila office during the times herein referred to, and that he is familiar with the details of the petitioners' business above referred to.

To the best of deponent's knowledge, information, and belief all the facts stated in the petition are true. No assignment or transfer of said claim or any part thereof or interest therein has been made, and that he believes the claimants are rightfully and justly entitled to the full amount named and stated in the said petition, after allowing all just credits and sets-offs, if any.

The reason why this affidavit is made by deponent is that no member of said firm is within the United States except at Manila.

The sources of deponent's information and grounds of his belief with respect to the matters alleged in the petition of which he has not knowledge are correspondence and interviews with petitioners and their agents and the examination of documents relating to their business.

E. VIEGELMANN.

Subscribed and sworn to before me this 30th day of June, 1902.

[L. S.] RALPH KIRBY,
Notary Public, Nassau County,
Certificate filed in New York County.

11 II.—*Amended petition, filed August 20, 1906.*

Philippine Duties. Imports from U. S. April 11, '99—Nov. 15, '01.

In the United States Court of Claims, Term 1905, 1906.

CONRAD HEINZEN AND GUSTAV BROCKMANN, TRADING AS partners under the firm name of C. Heinzen & Co., claimants. } No. 22914.

vs.

THE UNITED STATES.

Action No. 1.

AMENDED PETITION.

Conrad Heinszen and Gustav Brockmann, trading as partners under the firm name of C. Heinszen & Co., by Henry M. Ward, their attorney the claimants above named, for their amended petition against the United States, respectfully show to the court and allege as follows:

1. At all the times hereinafter mentioned, your petitioners were engaged in a general trading and mercantile business at the port of Manila, in the island of Luzon, in the Philippine Islands, and were and now are subjects of the Emperor of Germany.

12 2. The names set forth above in the title of this action are the full and true names and style of your petitioners.

3. On the 10th day of December, 1898, a treaty of peace between the United States of America and the Kingdom of Spain was concluded and signed by their respective plenipotentiaries at Paris, in the

French Republic. Said treaty was ratified by the Senate and by the President of the United States on the 6th day of February, 1899, and by Her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the city of Washington, in the District of Columbia, on the 11th day of April, 1899, and on the same day the said treaty was proclaimed by the President of the United States.

4. At the date of the ratification of said treaty, the military and naval forces of the United States had taken, occupied and were in possession of the town and port of Manila, in the island of Luzon. Under and pursuant to the terms of said treaty, the said island of Luzon , being part of the archipelago known as the Philippine Islands, was ceded by Spain to the United States, the rightful possession thereof recognized, and such cession accepted by the United States. By said treaty Spain promised and agreed that it would evacuate the territory so ceded by it, which it thereupon
13 proceeded to do. At all times thereafter said island of Luzon, and particularly the said town and port of Manila in said island, have remained in the complete possession of the United States without interference by Spain or by any other power, and the United States has, since the date of the signing of said treaty, exercised full administrative and legislative authority over said town and port of Manila.

5. Prior to the date of the signing of the said treaty of peace, the President of the United States made and issued a certain Executive order, dated at the Executive Mansion in the city of Washington, July 12th, 1898, and published by the Secretary of War, by order of the President, on the 13th day of July, 1898. The said order provided in substance that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, duties and taxes should be levied and collected upon articles imported into the Philippine Islands from other countries, and upon articles exported from the Philippine Islands to other countries at the rates and in the manner and subject to the regulations set forth and established by the Customs Tariff and Regulations for the Philippine Islands thereunto annexed.

Thereafter, by order of the Secretary of War, dated at the War Department, Washington, October 13th, 1898, and known as "Tariff Circular No. 18," it was ordered that the operation of said order of the President of July 12th, 1898, establishing a Customs Tariff and Regulations for ports in the Philippine Islands should be suspended until the 10th day of November, 1898, when the same should take effect and be in force, and that until that time the Spanish tariff as theretofore in force should be in force and duties collected
14 thereunder. In accordance with the last-named order on and after November 10th, 1898, the said tariff and regulations were put in force at the various ports of entry in the Philippine Islands, and more particularly at the said port of Manila, in the island of Luzon . The said Customs Tariff and Regulations

so established by the said order of the President of July 12th, 1898, as modified by certain amendments thereof made by order of the President from time to time, remained in force at all the ports of entry in the Philippine Islands, and particularly at the said port of Manila from on or about the 10th day of November, 1898, until on or about the 15th day of November, 1901. During all of that period import duties were collected under the alleged authority of said orders and of said tariff by the military authorities of the United States upon merchandise imported and brought into the several ports of entry in the Philippine Islands from the several States and Territories of the United States, as well as upon merchandise imported from foreign countries.

6. Said Customs Tariff and Regulations for the Philippine Islands provided, among other things, that every vessel on its arrival should be placed under military guard until duly discharged, and that no merchandise should be delivered until after the payment of the proper duties and charges thereon, when an order for the delivery of the merchandise should be issued by the proper military officer, and that any objection to the assessment of the duties must be filed by the importer before payment by him of the same, and that no refund of duties would be made thereafter, and that no delivery of imported merchandise should be made to the importer unless he had duly paid in cash the duties assessed theron and that any goods, wares, or merchandise not duly entered for payment of duty within ninety days after importation should be sold at auction by order of the commanding officer, and that the proceeds of such sale should be retained for ten days subject to the demand of the importer, after deduction of the proper duties on the goods and all expenses of storage and sale; and that all seized and confiscated goods should be sold in like manner.

The said customs tariff set forth the rates of duties on imports in certain schedules annexed thereto, and your petitioner beg leave to refer to the said Customs Tariff and Regulations as established by the said orders of the President and to the amendments thereof, and to make the same a part of this amended petition as fully to all intents and purposes as if herein set forth at large.

7. During the said period from November 10th, 1898, until November 15th, 1901, certain officers of the United States Army were designated under orders of the President or of their military superiors to act and did act as collectors of customs at the several ports in the Philippine Islands, and particularly at the said port of Manila. and enforced the said tariff and regulations as originally established and as amended from time to time upon and with respect to merchandise imported and brought into the ports in the Philippine Islands, and more particularly the said port of Manila from the several States of the United States, and collected duties thereunder upon such merchandise imported from the several States, at the same rates and in the same manner as upon and with respect

to merchandise imported into said Philippine ports and more particularly said port of Manila from foreign countries.

16 8. At all the times herein referred to and long prior thereto your petitioners were engaged in the business of a general mercantile and trading house in the said port of Manila and other Philippine ports, having correspondents in the city of New York, State of New York, and in many of the principal ports in other States of the United States, and in other countries, and in the usual and ordinary course of said business your petitioners imported a large quantity of merchandise from the several States of the United States into the said port of Manila, All of which merchandise was the growth, produce, or manufacture of one or more of the several States, or if of the growth, produce, or manufacture of any foreign country had been entered at one of the ports of entry within the several States and lawful duties had been paid thereon prior to its shipment to the Philippine Islands.

9. At various times after the issuance of the various orders herein above set forth, upon the arrival at the said port of Manila of such merchandise, imported by and consigned to your petitioners from the several States of the United States, the military officer of the United States then acting as collector of customs, and the subordinate military officers acting under his orders took possession of such merchandise and placed the same under military guard, in the manner prescribed in and by said Customs Tariff and Regulations in respect to merchandise imported into the Philippines from foreign countries, and proceeded to assess and levy duties thereon at the rates therein established, and refused to deliver possession of the same to your petitioners until after the payment in cash of the duties so assessed and levied, and threatened in the event of the default in the pay-

17 ment of such duties to seize such merchandise with the military forces at their command and to sell the same for the payment of the duties so levied by them in the manner prescribed in and by said Customs Tariff and Regulations. Your petitioners were thereupon obliged and compelled to pay and did pay to the military officer then acting as collector of customs the amount of duties so assessed by him but under duress, and in order to obtain possession of their said merchandise, and in order to carry on their business as aforesaid and to prevent the interruption and destruction of their said business, and upon such payment the said merchandise was released from the custody of said military authorities and delivered to your petitioners.

10. Your petitioners annex hereto and make a part of this petition a schedule, showing in detail the respective dates of payment of duties, numbers of customs receipts given by the military officers upon payment, names of vessels in which such merchandise was imported, invoice numbers, ports from which such merchandise was shipped, and amounts of payments of duties by your petitioners from April 11th, 1899, to November 15, 1901. The amount of duties so paid by your petitioners during the period above referred to is the sum of

sixteen thousand eight hundred and twenty-seven dollars and thirty-one cents ($16,827 31/100) lawful money of the United States.

18 11. The several military officers of the United States acting as collectors of customs as aforesaid paid over the several amounts of duties so collected by them from your petitioners as aforesaid to the United States, and the whole amount of such duties is now held by the United States, and no part thereof has ever been repaid to your petitioner .

12. The Government of Germany, of which country your petitioners are subjects, accords to citizens of the United States the right to prosecute claims against such Government in its courts as fully as they are allowed by law to prosecute them against the Government of the United States, and in such cases judgment may be recovered against Germany according to the nature and extent of the relief to which the suitor is entitled.

13. As your petitioners are advised by counsel, the proper construction of the said order of the President of July 12th, 1898, and of the Customs Tariff and Regulations thereby established, as amended from time to time, is that they ceased to apply to all articles imported and brought into the several ports in the Philippine Islands, and more particularly the port of Manila, from the several States of the United States at the moment the United States ceased to be a foreign country with respect to the Philippine Islands; that is to say, on April the 11th, 1899, the date when the said treaty of peace was ratified. And that all the merchandise so imported by your petitioners into said port of Manila , was not subject to any import duties, and was entitled to free entry into the said port.

19 14. As your petitioners are advised by counsel, the imposition and collection of said duties upon merchandise imported by your petitioner at the port of Manila as afroesaid were in violation of the rights and privileges secured to your petitioners as subjects of the Emperor of Germany, under and by virtue of the provisions of the Constitution of the United States and of the treaties between the United States and Germany and the laws of the United States, and the collection of such import duties by the military authorities as aforesaid in the amounts specified in said schedules, or in any other amount, is unauthorized, illegal, and in violation of the laws and Constitution of the United States and the treaties between the United States and Germany, and the petitioner claim that they are entitled to recover said moneys from the United States, and base their claim thereto upon the United States Constitution and the said treaties and the laws of the United States.

15. No part of the moneys so paid by your petitioner to the United States as aforesaid has ever been repaid by the United States, or any officer thereof, although payment thereof has been demanded. And by reason of the facts aforesaid the sum of sixteen thousand eight hundred and twenty-seven dollars and thirty-one cents (16,827 31/100) so paid by the petitioners to the United States, is now due to and owing the petitioners from the United States with interest.

Wherefore the petitioners demand judgment against the United States for the sum of sixteen thousand eight hundred and
20 twenty-seven dollars and thirty-one cents ($16,827 $\frac{31}{100}$), with interest and all proper relief in the premises.

(Sd.) HENRY M. WARD,
Attorney of Record for Claimant,
37 Nassau street, New York City.

21 STATE OF NEW YORK, *County of New York, ss:*

Henry M. Ward, being duly sworn, deposes and says, that he is the attorney of record for the petitioners herein. To the best of deponent's knowledge, information, and belief all the facts stated in the petition are true. No assignment or transfer of said claim or any part thereof, or interest therein has been made, and he believes the claimants are rightfully and justly entitled to the full amount named and stated in the said petition, after allowing all just credits and set-offs, if any.

The reason why this affidavit is made by deponent is that no member of the petitioners' firm is now within the Southern District of New York or the District of Columbia to the best of deponent's knowledge.

The sources of deponent's information and grounds of his belief with respect to the matters alleged in the petition of which he has not knowledge, are correspondence with petitioners' said firm and the examination of documents relating to their business, including the original customs receipts given upon payment of said duties, which said receipts are now in possession of deponent.

(Sd.) HENRY M. WARD.

Subscribed and sworn to before me this 16th day of August, 1906.

[NOTARIAL SEAL.] (Sd.) RALPH KIRBY,
Notary Public, Nassau County.
Certificate filed in New York County.

Date of payment.	Number of receipt.	Steamer.	Number of note.	From—	Country.	Amount of duties, Mexican currency.
1899.						
May 13	443	"Vortigern"/"Esmeralda"	49	New York	U. S. A.	$429.90
" 15	476	" "	50	" "	" " "	228.80
June 13	459	" /"Diamante"	47	" "	" " "	94.33
" 23	789	"Mogul"/Juensang	58	" "	" " "	585.73
Aug. 21	878	"Sikh"/"Diamante"	143	" "	" " "	385.10
Sept. 26	998	"City of Peking"/"Juensang"	82	California	" " "	688.74
Oct. 2	28	"Afghanistan"	2	New York	" " "	922.60
1900.						
January 24	1118	"Birchter"	15	" "	" " "	271.58
February 1	169	"Regulus"/"Loongsang"	35	" "	" " "	1,173.10
" 20	922	"Loostakken"	10	" "	" " "	422.69
" 21	924	"	11	" "	" " "	595.82
" 22	964	"Gaelic"/"Loongsang"	61	California	" " "	328.50
March 9	391	"Kenmore"	12	New York	" " "	503.69
May 18	996	"Java"	2715	" "	" " "	835.55
June 20	1225	"Albenga"	5105	" "	" " "	1,162.84
June 24	1224	"	5106	" "	" " "	260.00
July 6	196	"Kurdistan"	5565	" "	" " "	125.98
" 24	1272	"Richmond Castle"	6494	" "	" " "	227.95
August 14	977	"Orwell"	7786	" "	" " "	32.21
					Carried forward ...	$9,275.11

Date of payment.	Number of receipt.	Steamer.	Number of note.	From—	Country.	Amount of duties Mexican currency.
1900.				Brought forward..		$9,275.11
August 21....	1274	"Brand"	B 209/11	New York..	U. S. A ...	1,526.82
Sept. 8.....	390	"Doric/"Esmeralda"	B 161	California..	"	45.00
Oct. 24.....	1689	"Glenturrett"	B 4564	New York..	"	3,180.11
Nov. 3.....	158	"City of Peking"/"Esmeralda".	B 3558	California..	"	44.74
" 20.....	1461	" /"Menmuir"	B 4007	"	"	4.93
1901.						
January 7..	344	"Folmina"	B 9560	New York..	"	46.14
" 11..	595	"	B 9543	"	"	686.08
" 14..	759	"	B 9529	"	"	1,513.18
" 29..	1651	"Gymeric"	C 372	"	"	1,525.62
February 6..	515	"	C 360	"	"	934.72
" 28..	1819	"Albenga"	C 1425 C	"	"	33.54
March 19....	1236	"City of Peking"/"Juensang".	C 3950	California..	"	1,425.61
" 19....	1229	" /"Diamante".	C 4211	"	"	20.97
April 3.....	238	"Glenesk"	C 4169	New York..	"	2,591.56
May 17.....	1090	"Arcadia"	C 8339	"	"	112.71
" 31.....	2009	"	C 8336	"	"	1,665.81
July 25.....	1712	"Glamorganshire"	D 3227	"	"	528.31
				Carried forward...		$25,150.05

Date of payment.	Number of receipt.	Steamer.	Number of note.	From—	Country.	Amount of duties Mexican currency.
1901.				Brought forward..		$25,150.05
July 25.....	1713	"City of Peking"/"Perla"	D 3509	California..	U. S. A.	507.55
" 31.....	2035	"Gaelic"/"Juensang"	D 4033	"	"	3,396.42
Sept. 9.....	447	"Satsuma"	D 6078	New York..	"	1,672.98
" "	448	"	D 6078a	"	"	71.08
" "	449	"Nippon Maru"/"Diamante"..	D 6061	California..	"	171.73
" 11.....	640	"Longships"	D 6170	New York..	"	375.17
Oct. 6.....	391	"Richmond Castle"	D 8681	"	"	557.02
" 11.....	820	"City of Peking"/"Sungkiang".	D 9393a	California..	"	499.76
" 17.....	1136	" "	D 9393	"	"	525.56
Nov. 9.....	619	"Oronsay"	E 1408	New York..	"	727.31
						$33,654.63

22 III.—*Demurrer, filed August 23, 1906.*

In the Court of Claims.

CONRAD HEINSZEN AND GUSTAVE BROCKMANN,
trading as partners under the firm name of
C. Heinszen & Co., No. 22914.

v.

THE UNITED STATES.

Demurrer.

And now come the said defendants, by their attorney-general, and, demurring to the petition in this cause, state as the grounds thereof that the petition does not recite facts sufficient to constitute a cause of action.

And, further demurring to said petition, state as the ground thereof that the allegation of facts as set forth in said petition does not constitute a cause of action against the Government of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

GEO. M. ANDERSON,
Special Attorney.

23 IV.—*Opinion of the court overruling the demurrer, filed January 7, 1907.*

CONRAD HEINSZEN AND GUSTAVE BROCKMAN, trading as partners under the firm name of C. Heinszen & Co.,
v.
THE UNITED STATES.

BARNEY, J., delivered the opinion of the court.

The amended petition in this case, the original of which was filed July 1, 1902, alleges that the claimant shipped merchandise from ports in the United States into the Philippine Islands between April 11, 1899, and November 15, 1901, upon which they paid duties under the customs tariff and regulations promulgated by the Executive order of July 12, 1898, and subsequent amendments. It is alleged that between November 10, 1898, and November 15, 1901, certain army officers were designated under orders of the President to act, and did act, as collectors of customs at the ports of the Philippine Islands, and that upon the arrival at the port of Manila of articles brought by claimant from the United States the said military officers, acting as such collectors of customs and pursuant to and in accordance with said orders and regulations, took possession of such merchandise and placed it under military guard, in the manner prescribed by said regulations, proceeded to assess and levy duties thereon at the rate therein established, and refused to deliver possession of the same to the claimants until the payment in cash of such duties, and threatened, in the event of the default in the payment of such duties, to seize such merchandise with the military force at their command and to sell the same for the payment of such duties; that the claimants were compelled to and did pay to such military officers, acting as such collectors of customs, the amount of duties so assessed by him, but under duress, and in order to obtain possession of their said merchandise and in order to carry on their said business; and upon such payment said merchandise was released to them.

24 This action is brought to recover from the defendants the amount of the duties so paid by the claimant.

To this petition the defendants demur, and the questions raised by the demurrer are:

(1) Is the Government a proper party defendant? (2) Do the allegations of the petition negative a voluntary payment? (3) Did the validating act of June 30, 1906, legalize the collection of the duties of which the claimant complains? The demurrer of the defendants admits the truth of all the allegations contained in the petition properly pleaded, so that we must look to that pleading alone to determine these questions.

I. As to the first contention of the defendants we shall devote but little attention from the fact that when the Warner, Barnes & Co. case was before this court the same point was raised, and while the peti-

tion was dismissed by this court on other grounds, the case went to the Supreme Court, and was there considered twice (Lincoln et al. v. United States, 197 U. S., 419; 202 U. S., 484), and the decision of this court was reversed. While it was urged upon the argument of the demurrer in this case that this point was not considered in the Supreme Court, it hardly seems possible that so important a question should have entirely escaped the attention of the able counsel, as well as the court, in that case.

It appears from the allegations in the petition, and is also a historical fact, that the order of July 12, 1898, was issued by the President as a war measure during the Spanish war, and that the tax thereunder was collected by the military authorities of the United States. It is also alleged that "The several military officers of the United States, acting as collectors of customs as aforesaid, paid over the several amounts of duties so collected by them from your petitioners as aforesaid to the United States, and the whole amount of such duties is now held by the United States." Section 4 of the act of March 8, 1902, provided: "That the duties and taxes collected in the Philippine Archipelago * * * shall be held as a separate fund and paid into the treasury of the Philippine Islands to be used and expended for the government and benefit of said islands;" and, as was said by Judge Wright in his opinion in the Warner, Barnes & Co. case (40 C. Cls. R., 1, 31, 32), "such tariffs were collected solely as a military contribution. * * * The money was not covered into the Treasury of the United States, but was applied by the military government toward its own expenses in prosecuting the war, etc."

In short, this tax was collected by the military authorities of the United States and not by the authorities of the Philippine Islands, and if this collection was illegal we have no doubt the United States are liable for its return, unless they have some good defense thereto.

II. Upon the question of voluntary payment raised by the demurrer of the defendants we might repeat what has already been said upon the first point raised, viz, that a case involving the same question has been before this court before, and twice in the Supreme Court; and while it was not mentioned in the opinions, it is hardly possible that it was entirely unnoticed by either court, or eminent counsel who were engaged on either side.

We deem it, therefore, unnecessary to enter into an extended discussion of the question raised, but will only refer to the case of
25 Swift v. United States (111 U. S., 22), which appears to us to settle it. The opinion in that case, rendered by Justice Matthews, fully considers the question of voluntary payment under similar circumstances, referring to numerous authorities which we think are clearly applicable to the case at bar, and is ample authority for holding that the allegations in the petition make the payment of the tax in question involuntary.

This case was cited approvingly in United States v. Edmonston (181 U. S., 500), where it is said: "As indicated in the opinion in Swift Co. v. United States, there are cases in which the formality of

a protest or objection is unnecessary; some things may be taken as equivalent thereto or as sufficient in lieu thereof." (Ibid., 514.)

See Cooley on Taxation, 3d ed., 1505–1506.

Our attention has been called to certain regulations of the revenue department prescribing the manner and form of making protests to assessments of import duties. It is only necessary to say that the tax or imposition complained of in this case was an exaction upon goods which were not imported at all. (Dooley v. United States, 182 U. S., 222, 225.) It can hardly be successfully maintained that the Government can impose an illegal tax and at the same time prescribe the only manner in which objections can be made to its payment.

III. We now come to the most important and difficult question in the case, which is that raised by the contention that the act of June 30, 1906, validated all of the taxes collected by virtue of the order of July 12, 1898, and, of course, the taxes in question paid by the claimant. It is perhaps unnecessary to say in this connection that the decision of the Supreme Court in the insular cases makes the requirement of all duties after April 11, 1899, the date of the ratification of the Spanish treaty, until such duties were provided for by the Congress, contrary to law; hence the question whether the act of June 30, 1906, was curative of this illegality. The deficiency appropriation act of June 30, 1906, contained the following provision:

"That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States or from foreign countries, or exported from said islands are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed." (34 Stats. L., —.)

It must be admitted that this provision is unmistakable in its language and broad enough to completely cover the case if it is possible for Congress so to do.

We fully recognize the rule that a court should never declare a legislative act unconstitutional, and thereby refuse to obey its mandate, except upon the most careful consideration, and then only where there is hardly room for reasonable doubt. In the present case, however, we do not regard the question as an open one, as the Supreme Court, before the passage of the act in question, declared such a law to be unconstitutional as applicable to the case at bar, and in so doing used the following language, in commenting upon the act of March 24, 1900, chapter 339 (31 Stat. L., 151), and which was invoked
26 by the counsel for the United States as having curative force under like circumstances:

"As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the mony sued for could not be taken away by a subsepuent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action would be beyond its power. In any event, it should not be interpreted so as to make it retroactive." (De Lima v. Bidwell, 182 U. S., 199–200.)

In the case of Dooley v. United States (supra) the court held that the right to collect duties on goods brought from the United States into the Philippine Islands under the President's order of July 12, 1898, ceased on the exchange of ratifications of the treaty.

Later, in the case of Lincoln v. United States, and Warner, Barnes & Co. v. United States (202 U. S., 484), the court, in speaking of the effect of the ratification act of July 1, 1902, says:

"The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order. If the order, properly construed, did not purport to apply to vessels unnless they were either enemy or foreign, then when a vessel ceased to be foreign the order did not apply, and a tax upon such a vessel, not being in accordance with the order, is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton v. Dillin, 21 Wall., 73), still it is not to be presumed to do so on language which, literally taken, has a narrower sense."

Here we have a decision to the effect that Congress, in terms at least, could easily have ratified the collection of the duties. But inasmuch as no time is there mentioned when such act, to be effective, could have been passed, and the ruling in the case of De Lima v. Bidwell is cited approvingly, we again turn to the De Lima case, where we find in the paragraph quoted therefrom two things established, (1) that "the right to recover the money sued for could not be taken away by a subsequent act of Congress." Nor could such act deprive a claimant of his right to prosecute a pending suit. (2) That such act should not in any event be interpreted so as to make it retroactive.

Such being the decision of the Supreme Court, we do not regard the question of the constitutionality of the ratifying act of June 30, 1906, an open one, however much we might otherwise incline to apply the act in the present case.

Although we incline to the belief that we are bound by the decisions of the Supreme Court referred to, still in view of the importance of the case as well as our embarrassment at the seeming conflict between the legislative and judicial departments of the Government, we think it not out of place to refer to the ruling in other cases respecting what proceedings or acts may be the subject of ratification.

There are few questions which have been more frequently before courts for determination than those of retrospective and curative statutes relating to taxation, and for that reason such a
27 variety of facts have been presented in these cases that the majority of them give but little light in the decision of the present case.

Most of these cases present the question of the curative force of statutes applicable to the failure to comply with provisions of law relating to the assessment and collection of the tax, but where the tax itself was not fundamentally illegal; others, however, belong to an entirely different class and involve the right of the legislative department to cure an entire want of authority of the tax executive to act at all; in other words, by retrospection to create a tax which was not a tax before. While some of the first class mentioned come very close to the border line of those cases involving the right to collect any tax at all—i. e., the very groundwork of the taxation—we believe a clear distinction exists between the two classes which has generally been recognized by the courts and which is fundamental in their decisions.

It is proper also to remark that there is a lack of harmony in some of these cases, and to such an extent as to make it impossible to reconcile many of them; yet we think it can safely be said that the distinction above referred to has been recognized in all of them whenever such distinction was necessary to the decision of the case. The following are a few of the many cases of the first class—i. e., where the statute seeks only to cure some irregularities in the levying and collection of the tax, but where authority for the tax itself existed; or that it was justifiable either in the way of unsatisfied judgments against the municipality, public improvements made according to law, or the like:

Iowa Ry. C. v. Loper, 39 Iowa, 112.
Nottage v. Portland, 35 Oreg., 539.
Butler v. Toledo, 5 Ohio St., 225.
Dean v. Borschenius, 30 Wis., 236.

(See cases cited on p. 514, Cooley on Taxation, and in Black on Constitutional Prohibition, sec. 215.)

There is no conflict of the authorities in this class of cases, and the law is well settled that the legislature by a retrospective statute can cure such irregularities.

Before citing and commenting upon some of the cases where legislatures by retrospective statutes have attempted to cure the levying and collection of taxes for which there appeared to be no authority whatever, we will call attention to the comment of text writers upon the subject.

Judge Cooley, in his valuable work on Taxation, says:

"One very precise limit to the power to cure these proceedings is this: They can not be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every species of legal pro-

ceedings. Curative laws may heal irregularities in action, but they can not cure a want of authority to act at all." (Ibid., 514, 3d ed.)

The same author, in his work on Constitutional Limitations, says: "So he who was never bound either legally or equitably can not have a demand created against him by a mere legislative enactment." (Ibid., 454, 6th ed.) "A retrospective statute curing defects in legal proceedings where they are in the nature of irregularities, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden." (Ibid., 456.)

28 "If the thing wanting or which failed to be done, and which constituted the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." (Ibid., 457.) "A curative statute can only be valid when the defect which it seeks to obviate is the lack of some formality which the legislature might have dispensed with in advance, or where the irregularity which is intended to be excused is one which the legislature might in advance have rendered immaterial." (Black on Constitutional Prohibition, sec. 215.)

In the early case of Fletcher v. Peck (6 Cranch, 87), where one of the questions before the court was the constitutionality of an act of the legislature of Georgia which sought to impair the land title of one of the parties, in delivering the opinion of the court, Chief Justice Marshall (ibid., 135–136) said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act for transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection."

In Bennett v. Fisher (26 Iowa, 497, 501), Chief Justice Dillon, in speaking of retrospective laws, says: "Such exercise of power can only be defended upon principle and sustained in law where they are not directed against the vested rights of particular individuals or classes."

The case of Hart v. Henderson (17 Mich., 218) involved the constitutionality of a legislative act which was sought to be construed as validating an illegal tax. In declaring the act, with such construction, as unconstitutional, Judge Cooley, in speaking for the court, says: "Curative statutes may cover any mere irregularity in the course of proceeding for the enforcement of a lawful demand; but they can never cure a want of jurisdiction, either in tax proceedings or those of any other description. Nothing is a tax simply by being called so, for any proceedings by which a man's property is to be taken from him on a claim which has no other basis than the naked

declaration of the legislature that it shall constitute a demand against him is unconstitutional and void."

In the case of Kimball v. Rosendale (42 Wis., 407), this question was discussed by Chief Justice Ryan, and he said: "Perhaps the true limit of the curative power of the legislature, as gathered from all the authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void; defects of execution only, not of authority or jurisdiction; and is confined to defective proceedings under previous legislative authority." (Ibid., 412–413.)

In the case of Daniels v. Watertown (61 Mich., 514), personal property had been seized and sold by the tax collector under a void assessment, and after suit brought by the owner of the property against the town to recover the proceeds of the sale the legislature passed a curative act validating the assessment. It was held that the rights of the parties became vested prior to such legislation and were not affected thereby.

29 In People v. Goldtree (44 Cal., 325), in passing upon the constitutionality of a legislative act enacted for the purpose of curing a defective assessment of taxes, the court says: "It is impossible to draw a well-defined line between the classes of defects which may and those which may not be remedied by curative legislation, nor are the authorities on the subject reconcilable." And, further, "We think it can safely be laid down as a rule in these matters that whenever the officer had no power or jurisdiction to do the act in question, and not that in its performance he did not pursue the law in respect to time, mode, or some other particular, the act is void, and subsequent legislation can not cure the defect."

The counsel for the defendant has cited Grim v. Weissenberg (57 Pa. St., 433) as sustaining their contention that the act in question is effectively curative. That was a case arsing during the late civil war where a tax for raising a bounty for volunteers was levied without any authority of law. This tax was subsequently ratified by the legislature, and this curative statute was held valid for that purpose. How much the necessities of war may have influenced this decision it is unnecessary to inquire, and it is sufficient to say that Judge Cooley in his work on taxation refers to this case in a note and speaks of another case immediately following it as "a more doubtful one." (Cooley on Taxation, 515, note 1, 3d ed.) The same criticism might be made of the case of Kunkle v. Franklin (13 Minn., 127), where a similar war tax was illegally imposed and subsequently ratified by the legislature, and where doubt as to the soundness of the doctrine is expressed in the opinion itself, for the court in holding the curative statute valid says: "Although this question is not free from doubt and embarrassment, we think it must be answered in the affirmative. It is true, as said by Mr. Chancellor Kent, that a retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."

The case of Hamilton v. Dillon (21 Wall., 92) is also relied upon by the counsel for the defendant. With reference to that case it is sufficient to say (1) the tax was held legal without any validating act, and (2) the tax was also a proper exercise of the military power of the President against an enemy in time of war.

Any number of cases might be further cited where this question is discussed and decided; and in nearly all of them the same rule is kept in view and maintained, i. e., that retrospective statutes relating to defects in tax proceedings are valid only to the extent of curing such defects as are in the nature of irregularities, and can not extend to matters of jurisdiction. We believe there are but few cases where this rule has not been followed; and in those cases the decisions are based upon exceptional circumstances which bring them near to the border line before mentioned.

If a tax can be imposed and collected under Executive order without any authority whatever of the Congress, where the sole authority for taxation under the Constitution rests, and such illegal act can be afterwards validated by Congress to the extent of refusing redress to parties who have paid this tax under duress, it would seem that there was no limit to retroactive legislation by Congress except such as are provided in express terms by the Constitution.

If the claimants had refused to submit to the imposition of the tax in question, and had taken their merchandise into the Philippine Islands clandestinely, thus evading its payment, it would not be claimed that they could be convicted of the crime of smuggling; indeed, it would not be contended that any duty could be recovered of them by virtue of said validating act of Congress. This being so, we are confronted in this case with the anomaly of the claim that the Congress by said act has imposed a burden upon those who have peacefully submitted to the imposition of an illegal tax, trusting to the courts for redress, which might have been successfully avoided by a disregard and contempt of the military authorities of the Government. A mere statement of this claim appears so shocking to every sense of justice and idea of good citizenship as to need no argument to show its unsoundness.

It is unnecessary to say that at the time the Executive order in question was issued its provisions were well within the war power of the President, and that all taxes received under it were collected only during such times as it was deemed a proper exercise of such power. The different views which were entertained upon that subject were set at rest, however, by the decision of the Supreme Court in Lincoln v. United States (supra), and which has given rise to the present litigation.

The demurrer is overruled, with leave to the defendants to further plead as they may be advised at any time within sixty days.

By the Court.

31 V.—*Traverse, filed January 22, 1907.*

In the Court of Claims of the United States, December term, A. D. 1906.

C. HEINSZEN & Co.,
vs.
THE UNITED STATES. } No. 22914.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

32 VI.—*Submission of case.*

On the 22nd day of January, 1907, this case was submitted on an agreed statement of facts, by Mr. Henry M. Ward, attorney for claimants, and Mr. Assistant Attorney-General J. A. Van Orsdel for the defendants.

33 VII.—*Findings of fact and conclusion of law filed by the court on stipulation of parties January 23, 1907.*

Court of Claims.

CONRAD HEINSZEN AND GUSTAV BROCKMANN, trading as partners under the firm name of C. Heinzen & Co.,
v.
THE UNITED STATES. } No. 22914.

The above-entitled cause coming on for trial the parties submit stipulations, which they agree the court may adopt as the findings of fact in the case; and the court, after examining the same, adopts said stipulations as the findings of fact, and directs a conclusion of law to be entered thereon awarding judgment for the claimant against the United States in the sum of sixteen thousand eight hundred and twenty-seven dollars and thirty-one cents ($16,827.31).

The stipulations agreed upon, together with the Customs Tariff and Regulations for the Philippine Islands, made a part thereof, are as follows:

34 In the Court of Claims, Term, 1906–07.

CONRAD HEINSZEN AND GUSTAV BROCKMANN, trading as partners under the firm name of C. Heinszen & Co., claimants, v. THE UNITED STATES. } No. 22914.

Agreed Statement of Facts.

Come now the claimants, by their attorney, and the United States, by the Attorney-General, and stipulate and agree that the following statement of facts is true and may embrace the finding of facts by the court in this case:

First. The claimants above named, Conrad Heinszen and Gustav Brockmann, were, during the years 1899, 1900, and 1901, engaged as partners in a general trading and mercantile business at the port of Manila, island of Luzon, in the Philippine Islands, under the firm name of Conrad Heinszen & Co., and were then and now are subjects of the Emperor of Germany.

35 Second. In the course of said business the claimants shipped a large quantity of miscellaneous merchandise from the several States of the United States into the port of Manila, all of which merchandise was the growth, produce, or manufacture of one or more of the several States of the Union.

Third. Prior to December 10th, 1898, the date of the signing of the treaty of peace between the United States and Spain, ratified April 11, 1899, the President of the United States made and issued a certain Executive order, dated at the Executive Mansion in the city of Washington, July 12, 1898, and published by the Secretary of War by order of the President on the 13th day of July, 1898. The said order provided as follows, to wit:

"EXECUTIVE MANSION, *July 12, 1898.*

"By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof shall take effect and be in force in the ports and places so occupied.

"Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

"Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

36 "Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

"WILLIAM MCKINLEY.

"Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States, the foregoing order will be proclaimed and enforced.

"R. A. ALGER,
"*Secretary of War.*"

Annexed to the said order were regulations for the collection of the customs duties thereby imposed and schedules of such duties. The said Executive order, Customs Tariff and Regulations for the Philippine Islands, with amendments thereof, up to November 29, 1899, are set forth in the appendix annexed to this finding of facts.

At all times from November 10, 1898, to November 15, 1901, the foregoing order and the said Customs Tariff and Regulations, with various supplemental orders and amendments of the said order Customs Tariff and Regulations duly made and promulgated from time to time, which supplemental orders and amendments are hereby embraced in and made a part of this finding of facts as fully to all intents and purposes as if set out in detail herein, were in force at the various ports of entry in the Philippine Islands, and more particularly at the said port of Manila in the island of Luzon.

37 Fourth. Pursuant to said order, certain officers of the United States Army were designated by the general in command of the military forces of the United States in the Philippine Islands to act and did act as collectors of customs at the said port of Manila, and under the provisions of said order and the amendments thereof collected duties upon all articles shipped into the Philippine Islands from the United States, including the said articles so shipped by the claimants, between the 11th day of April, 1899, and the 15th day of November, 1901, at the same rates and in the same manner as prescribed by the said order and the amendments thereof with respect to like articles imported into the Philippine Islands from foreign countries.

Fifth. Upon the arrival at the port of Manila, during the years 1899, 1900, and 1901, of all vessels containing merchandise shipped from the United States, including the merchandise so shipped by the claimants, the officer of the United States Army then acting as collector of customs at that port, placed upon said vessels a military guard, as provided for in the said rules and regulations, and proceeded to assess, levy, and collect customs duties upon the said merchandise at the rates and in the manner prescribed in and

38 by said order, Customs Tariff and Regulations, with respect to like articles of merchandise imported from foreign countries, all of which acts of the said military officer acting as collector were

done by him in compliance with the terms of the said order, Customs Tariff and Regulations, and amendments thereof, and in conformity with the provisions thereof relating to similar articles imported into the Philippines from foreign countries.

Sixth. Under the provisions of the Executive order of May 8, 1899, the Secretary of War from time to time appointed an officer of the United States Army to act as treasurer of the Philippine Islands, and such officer acted accordingly. The officer so acting as collector of customs after collecting the duties assessed by him upon merchandise imported from all parts of the world into the Philippine Islands, including the moneys collected by him as duties upon shipments from the United States and including the moneys so collected from these claimants, paid the same over by order of such general in command to the said treasurer of the Philippine Islands. These moneys so collected as customs duties, together with other revenues collected by the military government were applied toward paying the expenses of the said government and in maintaining and carrying on the said
39 government. None of the revenues so collected, including the duties herein claimed, were ever paid into the Treasury of the United States in Washington, nor were they ever subject to the jurisdiction or under the control of any official of the Treasury Department of the United States.

Seventh. The Government of Germany accords the citizens of the United States the right to prosecute suits against that Government, and in such suits judgment may be recovered according to the nature and extent of the relief to which the suitor is entitled.

Eighth. The amount of duties so assessed and levied upon such articles of merchandise and so collected by the officers of the United States Army acting as collectors of customs, from the claimants between April 11, 1899, and November 15, 1901, is the sum of $16,827.31, no part of which sum has ever been repaid to the claimants.

Dated this 22d day of January, A. D. 1907.

HENRY M. WARD,
Attorney for Claimants.
J. A. VAN ORSDEL,
Assistant Attorney-General.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to judgment in the sum of sixteen thousand, eight hundred and twenty-seven dollars and thirty-one cents ($16,827.31).

BY THE COURT.

40 *Appendix to findings of fact in Heinszen v. The United States. 22914. Filed January 22, 1907. J. Randolph, A. C. C. C.*

CUSTOMS TARIFF AND REGULATIONS

FOR THE

PHILIPPINE ISLANDS,

WITH

TARIFF CIRCULARS MODIFYING SAME TO NOVEMBER 29, 1899.

WAR DEPARTMENT.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1899.

41

CUSTOMS TARIFF AND REGULATIONS

FOR THE

PHILIPPINE ISLANDS,

WITH

TARIFF CIRCULARS MODIFYING SAME TO NOVEMBER 29, 1899.

WAR DEPARTMENT.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1899.

42 TARIFF CIRCULAR, No. 18.

WAR DEPARTMENT,
Washington, October 13, 1898.

By direction of the President, it is hereby ordered that the operation of the order dated July 12, 1898, establishing the Customs Tariff and Regulations for Ports in the Philippine Islands in Possession of the United States, shall be suspended until the 10th day of November, 1898, when the same shall take effect and be in force.

Until that time the Spanish tariff as now applied will be enforced and collected.

R. A. ALGER,
Secretary of War.

43 WAR DEPARTMENT,
Washington, July 13, 1898.

The following order of the President is published for the information and guidance of all concerned:

EXECUTIVE MANSION, *July 12, 1898.*

By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that, upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

WILLIAM MCKINLEY.

Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States the foregoing order will be proclaimed and enforced.

R. A. ALGER,
Secretary of War.

44 TARIFF CIRCULAR, No. 48.

WAR DEPARTMENT, *Washington, April 10, 1899.*

By direction of the President, the following paragraph is added to the "Customs Tariff and Regulations for the Philippine Islands," immediately preceding paragraph 1, page 5, thereof:

1. The port of Manila has been duly designated as the chief customs port of the Philippine Islands, and the following have been declared to be subports, viz: Iloilo and Cebu, and the officer of the Army duly assigned to each of said ports as collector will have general jurisdiction of the collection of customs at such ports, respectively. Every collector stationed at a subport will make weekly reports to the collector at Manila of all transactions at his subport, with copies of all entries of merchandise duly certified; and all moneys collected at subports must be deposited with the duly designated officer, whose receipt therefor must be taken in duplicate. Any questions arising at any subport will be referred to the collector at Manila for his decision, from which there shall be no appeal, except in such cases as he may refer for decision to the Secretary of War.

This order will be duly proclaimed and enforced in the Philippine Islands.

G. D. MEIKLEJOHN,
Acting Secretary of War.

TARIFF CIRCULAR, No. 69.

WAR DEPARTMENT, *Washington, May 24, 1899.*

By direction of the President, the Amended Customs Tariffs and Regulations for Ports in Cuba, Porto Rico, and the Philippine Islands are hereby amended by the substitution of the following paragraph for paragraph 2, page 7, of the Cuban Regulations, paragraph 3, page 8, of the Porto Rican Regulations, and paragraph 1, page 5, of the Philippine Regulations:

Every vessel shall, on arrival, be placed under customs control until duly discharged. Passengers with no dutiable property in their possession may be permitted to land without detention. If any merchandise be found on board any vessel which is not included in her manifest produced as required by these regulations, the master shall forfeit an amount equal to the value of the merchandise not manifested, and all such merchandise belonging to or consigned to the officers or crew of the vessel shall be forfeited. These forfeitures shall not be incurred, however, if it shall be made to appear to the principal customs officer at the port that the errors and omissions in the manifest were made without intention of fraud or collusion. In such case the master may be allowed to correct his manifest by means of a post entry. *Should any package or article named on the manifest be missing on the arrival of the vessel, or if the merchandise on board does not otherwise agree with the manifest delivered by the master, except as above prescribed, the master shall be liable to a penalty of $500; but if it is made to appear to the satisfaction of the principal customs officer at the port that no part whatever of the merchandise of such vessel has been unshipped, landed, or unladen since it was taken on board, except as specified in the manifest, and pursuant to permits, or that the disagreement is by accident or mistake, in such case the penalty shall not be inflicted.*

This order will be duly proclaimed and enforced in Cuba, Porto Rico, and the Philippine Islands.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

45 TARIFF CIRCULAR, No. 10. } WAR DEPARTMENT, *Washington, September 10, 1898.*

The following order of the President is published for the information and guidance of all concerned:

EXECUTIVE MANSION, *September 9, 1898.*

Paragraph 4, "Entrance and clearance of vessels," of Customs Tariff and Regulations for the Philippine Islands is hereby amended so as to read as follows:

Prior to the departure of any vessel from any of the ports herein designated the master shall deposit with the proper officer a manifest of the outward cargo of such vessel, specifying the marks and numbers of packages, a description of their contents, with names of shippers and consignees, with a statement of the value of each separate lot; also names of passengers and their destination. A clearance shall then be granted to the vessel. No prohibited or contraband goods shall be exported.

WILLIAM MCKINLEY.

Upon receipt of this order by the officer in command of the United States forces at any port or place in the Philippine Islands in possession of the United States, said order will be proclaimed and enforced.

G. D. MEIKLEJOHN,
Acting Secretary of War.

46 REGULATIONS FOR THE GUIDANCE OF OFFICERS CONCERNED IN THE COLLECTION OF DUTIES ON IMPORTS AND EXPORTS, TAXES, AND OTHER CHARGES AND EXACTIONS TO BE LEVIED AND COLLECTED AS A MILITARY CONTRIBUTION AT PORTS AND PLACES IN THE POSSESSION OF OR UNDER THE CONTROL OF THE FORCES OF THE UNITED STATES, IN THE PHILIPPINE ISLANDS.

ENTRANCE AND CLEARANCE OF VESSELS.

1. Every vessel shall, on arrival, be placed under military guard until duly discharged. Passengers with no dutiable property in their possession may be permitted to land without detention.

If, upon the unlading of any cargo, there shall be found goods, wares, or merchandise not duly declared on the manifest, such articles in excess shall be required to pay additional duties of 25 per cent on the regular duties. Should any packages or articles named on the manifest be missing on the arrival of the vessel, the latter shall pay a penalty of $1 per ton measurement, unless such deficiency shall be satisfactorily explained or accounted for.

2. Within twenty-four hours after the arrival of any vessel the master must, under a penalty for failure of $1 per ton registry measurement, produce to the proper officer a manifest or her cargo, with the marks, numbers, and description of the packages and the names of the respective consignees, which manifests, if the vessel be from a port in the United States, shall be certified by the collector of the port of sailing. If the vessel be from any other than a United States port, her manifest must be certified by the United States consul or commercial agent at such port; if there be no United States consul or commercial agent at such port, then by the consul of any nation at peace with the United States; and the register of the vessel shall, upon her arrival in the Philippines, be deposited with the consul of the nation to which she may belong, if any there be, otherwise with the commandant at the port, until the master shall have paid such tonnage taxes and other port charges as may be due under these regulations.

3. No vessel shall be allowed to clear for another port until all her cargo shall be landed or accounted for. All goods not duly entered for payment of duty within ten days after their arrival in port shall be landed and stored, the expense thereof to be charged against the goods.

4. Prior to the departure of any vessel from any of the ports

47 herein designated the master shall deposit with the proper officer a manifest of the outward cargo of such vessel, specifying the marks and numbers of packages, a description of their contents, with names of shippers and consignees, with a statement of the value of each separate lot; also names of passengers and their destination. A clearance will then be granted to the vessel, but no clearance will be granted to any port in the Philippines not in possession or under control of the United States. No prohibited or contraband goods shall be exported.

LIGHT DUES.

5. At all ports or places in the Philippines which may be in possession or under administrative control of the land or naval forces of the United States there shall be levied the following navigation and port charges:

	Per net ton
On each entry of a vessel from a port or place, except from another port or place in the Philippines in possession of the United States	$0.1
On each departure of a vessel for a port or place, except for another port or place in the Philippines in possession of the United States	.1
On each entry of a vessel from another port or place in the Philippines in possession of the United States	.0
On each departure of a vessel for another port or place in the Philippines in possession of the United States	.0

6. The following shall be exempt from light dues:

A vessel belonging to or employed in the service of the Government of the United States; or a vessel of a nuetral foreign government not engaged in trade; or a vessel in distress; or a yacht belonging to an organized yacht club of the United States or of a nuetral foreign nation.

7. The tonnage of a vessel shall be the net or register tonnage expressed in her national certificate of registry.

ENTRY OF MERCHANDISE.

8. The consignee named in the bill of lading, or the person to whom such consignee shall, by indorsement, have assigned the bill of lading shall present to the officer duly designated for that purpose his bill of lading, an invoice describing the goods, showing their character quantity, and cost, together with an entry in duplicate showing the name of the importer and of the vessel of importation, the place whence the goods were imported, the date of their arrival at the port of destination, the marks and numbers of the packages, the nature and quantity of their contents, their value, including all costs incurred in packing them for shipment, and the currency in which the invoices were made out. The invoice must be made out in the currency of the country of exportation and must be verified by the oath of the shipper. The entry shall be signed by the importer, who must make affidavit to the truth of all the statements contained therein, and shall agree in value and description with the facts shown by the invoice.

48 TARIFF CIRCULAR, No. 62.

WAR DEPARTMENT,
Washington, May 3, 1899.

By direction of the President, the Amended Customs Tariff and Regulations for Ports in Cuba, Porto Rico, and the Philippine Islands are hereby amended as follows:

Article 15 of the Regulations for Cuba and Porto Rico is amended to read as follows:

For the assessment of duty the currency of the invoice must be reduced to the money of account of the United States upon the basis of the values of foreign coins, as proclaimd by the Secretary of the Treasury on the first days of January, April, July, and October of each year. The date of the *invoice* will indicate the value of the currency.

Article 17 of the Regulations for Cuba and Porto Rico and article 8 of the Regulations for the Philippine Islands are amended to read as follows:

The consignee named in the bill of lading or the person to whom such consignee shall, by indorsement, have assigned the bill of lading, shall present to the officer duly designated for that purpose by the military authority his bill of lading, an invoice describing the goods, showing their character, quantity, and cost, together with an entry in duplicate showing the name of the importer and of the vessel of importation, the place whence the goods were imported, the date of their arrival at the port of destination, the marks and numbers of the packages, the nature and quantity of their contents, their value, including costs incurred in packing them for shipment, and the currency in which the invoices were made out. The invoice must be made out in the currency of the country of exportation, and *need not be verified*. The entry shall be signed by the importer, who must make affidavit to the truth of all the statements contained therein, and shall agree in value and description with the facts shown by the invoice.

This order shall be duly proclaimed and enforced in Cuba, Porto Rico, and the Philippine Islands.

G. D. MEIKLEJOHN,
Acting Secretary of War.

TARIFF CIRCULAR, No. 9.

WAR DEPARTMENT,
Washington, September 9, 1898.

The following order of the President is published for the information and guidance of all concerned:

EXECUTIVE MANSION, *September 9, 1898.*

Article 14 of Customs Tariff and Regulations for the Philippine Islands is hereby amended so as to read as follows:

Any goods, wares, or merchandise not duly entered for payment of duty within ninety days after importation shall be sold at auction by order of the officer in command of the United States forces after five days' public notice conspicuously posted at the port; provided, that the period of ninety days may be extended by said officer not exceeding a period of six months from the date of importation when good and sufficient reasons therefor are presented to him, if in his judgment the interests of the Government will permit of such extension. The proceeds of such sale will be kept for ten days subject to the demand of the importer, after deduction of the proper duties on the goods and all expenses of storage and sale.

WILLIAM MCKINLEY.

49 The commanding officer has been authorized to lease a building for the storage of imported merchandise not entered at the custom-house as contemplated by article 14 of Customs Regulations for Philippine Islands. The storage will be at the sole risk of importers, and every expense connected therewith will be charged to the respective goods.

G. D. MEIKLEJOHN,
Acting Secretary of War.

TARIFF CIRCULAR, No. 14.

WAR DEPARTMENT,
Washington, September 27, 1898.

Article 13 of Customs Tariff and Regulations for the Philippine Islands is hereby amended by adding thereto the following, viz:

On arrival at any port in the possession of the United States of merchandise intended for exportation beyond the Philippine Islands, the duty imposed and collected thereon under this paragraph may be refunded on reshipment under the supervision of a customs officer and clearance of the exporting vessel for a foreign port, or on satisfactory evidence of the landing abroad of such merchandise, which evidence shall consist of a landing certificate signed by the consignee and master and mate of the exporting vessel, and duly attested by a customs officer or United States consular officer at the port of destination.

If practicable, such merchandise may be exported under bond with good and sufficient security, without payment of duty, and the bond may be canceled on the production of the landing certificate above specified.

G. D. MEIKLEJOHN,
Acting Secretary of War.

50 9. After the packages and contents have been duly compared with the invoice and found to agree therewith, the duty due thereon will be computed on the face of the entry, and after the payment of the proper duties and charges an order for the delivery of the packages and contents will be issued by the proper officer.

10. Any objections to the assessment of duty must be filed by the importer before the payment by him of the same, and no refund of duty will be made thereafter.

11. Goods found to be fraudulently invoiced, either as to character or quantity, and all goods attempted to be introduced without permit, shall be confiscated.

12. No delivery of imported merchandise shall be made to the importer unless he shall have duly in cash the duties assessed thereon.

13. Coastwise cargoes shall be subject to duties the same as if coming from a foreign port, except as to the trade between ports in possession of the United States.

14. Any goods, wares, or merchandise not duly entered for payment of duty within ninety days after importation shall be sold at auction by order of the commandant after five days' public notice conspicuously posted at the port. The proceeds of such sale will be kept for ten days subject to the demand of the importer, after deduction of the proper duties on the goods and all expenses of storage and sale.

15. All seized and confiscated merchandise will be sold in like manner, and the proceeds, after deduction of expenses, will be turned over to the officer duly designated for that purpose.

16. Merchandise originally destined for some port or place in the Philippines, not in the possession of the United States forces, may be entered at one of the designated ports. Vessels may likewise enter, although originally cleared for a port in the Philippines not in possession of the United States.

WHARF CHARGES.

17. Goods of all kinds exported through ports of the Philippines, declared open by the United States, shall pay a charge of 1 peso per 1,000 kilograms gross, as a charge for wharfage, whatever be the port of destination or nationality of the exporting vessel.

18. Goods of all kinds imported into ports of the Philippines, declared open by the United States and destined for transshipment to other ports of the Philippines declared open by the United States, shall pay a charge for wharfage of one-half of 1 peso per 1,000 kilograms gross at the port of transshipment as a due for wharfage.

19. Merchandise imported, exported, or shipped in transit for the use of the Government of the United States, and coal, shall be exempt from wharf charges.

20. In addition to customs dues and other charges there shall be levied a charge of 2 per centum ad valorem, to be summarily ascertained, on the value of merchandise, free or dutiable, imported into or exported from the Philippines; but merchandise imported or exported for the use of the Government of the United States and coal shall be exempt from this charge.

21. The officer duly designated for that purpose shall receive all customs duties, fees, and charges, and shall without delay pay the same over to such officer as shall be designated by the commanding general. Records shall be kept and accounts rendered of all money transactions and receipts in duplicate shall be taken by the officer paying over such moneys, one copy to be retained by him as his official voucher and the other transmitted by mail with his accounts to the War Department, Washington, D. C.

22. Such public buildings as may be suitable for the purpose shall be used and occupied for the transaction of business and for the storage of imports in the ports aforesaid.

23. All supplies and materials for the use of the Army and Navy of the United States shall under suitable restrictions to be prescribed by the commanding general, be admitted without payment of duty.

RATES OF DUTY ON IMPORTS.

CLASS I.—STONES, EARTHS, MINERALS, GLASS AND GLASSWARE, AND CERAMIC PRODUCTS.

GROUP 1.—*Stones and earthen productions employed in building, arts, and industry.*

		Pesos.
24.	Marble, jasper, and alabaster, in the rough or in dressed pieces, squared and prepared for taking the form.....100 kilos..	0.08
25.	Marble, jasper, and alabaster, cut into squares, slabs, or steps of any dimension, polished or not.....100 kilos..	.75
26.	Marble, jasper, and alabaster, worked up and chiseled into any object, polished or not, other than ornamental or articles of luxury, 100 kilos.....	1.60
27.	Other stones employed in building, arts, and industry; also cement, 100 kilos.....	.50

GROUP 2.—*Coal.*

28.	Coal and coke [1].....ton of 1,000 kilos..	.50

GROUP 3.—*Schists, bitumen, and their derivations.*

29.	Tar, pitch, asphalt, bitumen, and schists; also unrefined creosote, [2] 100 kilos.....	.09
30.	Naphtha, vaseline, crude petroleum, natural and crude oils derived from schist [2].....100 kilos	4
31.	Benzine, gasoline, petroleum, and other mineral oils, refined [2]..do....	4.50

[1] Coal and coke shall be cleared in conformity to the weight indicated in the certificate issued to the master of the vessel by the consul at the port of shipment, providing the quantity received on board according to the charter party and the bills of lading, which documents the said consul shall demand to see for the purpose. In case of doubt the customs may verify the quantity.

[2] Crude oils derived from schist shall be understood to be those derived from the first distillation, distinguishable by their yellowish color and density of from

52		Pesos.
	GROUP 4.—*Ores.*	
32.	Ores ..... ton of 1,000 kilos..	0.25
	GROUP 5.—*Glass and glassware.*	
33.	Common or ordinary hollow glassware [1] ..... 100 kilos..	1.60
34.	Crystal, and glass imitating it, also gilt or silvered in the interior,[2] 100 kilos	6
35.	Glass and crystal, in plates and sheets ..... 100 kilos..	3
36.	Glass and crystal, silvered, and glasses for spectacles and watches, kilo	.05
	GROUP 6.—*Pottery, earthenware, and porcelain.*	
37.	Clay, in bricks, squares, and tiles, for building purposes, furnaces, etc.,[3] 100 kilos	.02
38.	Clay, in large and small paving tiles; tiles of colored faience, varnished tiles and piping [4] ..... 100 kilos..	.40
39.	Faience and wares of fine clay [5] ..... do....	6
40.	Porcelain ..... do....	10
	CLASS II.—METALS, AND ALL MANUFACTURERS IN WHICH A METAL ENTERS AS A PRINCIPAL ELEMENT.	
	GROUP 1.—*Gold, silver, and platinum.*	
41.	Gold and silver in jewelry or plate,[6] even set with pearls or precious stones [6] ..... hectog..	5
42.	Gold, silver, or platinum worked into other objects [7,8] ..... do....	.50

0.900° to 0.920°, or from 66 to 57½ of the centesimal areometer, equal to from 24.69° to 21.48° Cartier.

Petroleums having the following properties are considered as crude natural petroleums:

First. Those which when distilled gradually and continuously in a glass apparatus at a temperature of 300° Centigrade leave a residuum exceeding 20 per cer cent of their primitive weight.

Second. When this residue in its turn leaves 1 qer cent at least of coke in qroportion to the total weight of petroleum assayed.

Third. When, according to E. Granier's apparatus, they are found to be inflammable at a temperature lower than 16° Centigrade.

All petroleums and other mineral oils not possessing the above characteristics shall be considered as refined.

[1] Are included in this number bottles, demijohns, and flasks for oil, wine, drugs, perfumery, and chemicals, provided they be not cut; and unpolished glass of more than 12 millimeters in thickness for roofs and pavements.

[2] Are also included in this number bottles, tumblers, glasses, and other objects for table service, ornament, and lighting, whether of crystal or white or colored glass, as well as beads.

[3] Only rough bricks, squares, and tiles of baked earth or clay employed in the construction of walls, furnaces, etc., are to be included in this number.

[4] No. 15 includes tiles for pavements and small tiles for mosaic work, and also the articles for building contained in No. 14, when glazed, painted, enameled, and made of washed or sifted earths.

[5] The articles of fine clay included in this number are dinner services, kitchen earthenware, flower vases, ornaments, and the like.

[6] In the classification of jewelry or ornaments will be included all small articles of luxury valuable on account of workmanship, whatever their denomination, and generally intended for the ornament of persons of both sexes.

[7] Utensils for domestic use, articles for church use, and generally all large objects used for the ornamentation of houses are included in this number.

[8] In clearing finished articles, including jewelry and articles of gold, silver, or platinum filled with mastic, a reasonable tare allowance shall be made for such mastic.

53 GROUP 2.—*Iron and steel.*[1]

			Pesos.
43.	Cast iron, in pigs, and old iron	100 kilos	0.50
44.	Cast iron, in tubes of all kinds	do	.95
45.	Cast iron, in common manufactures	do	1.50
46.	Cast iron, in fine manufactures; i. e., those polished, enameled with a coating of porcelain, or with ornaments of other metals	100 kilos	3.50
47.	Wrought iron and steel rails	do	1.60
48.	Wrought iron and steel in sheets of a thickness of 6 millimeters or more, and bolts	100 kilos	1.80
49A.	Wrought iron and steel in bars of any form, in sheets up to 6 millimeters in thickness; axles, tires, and springs for carriages; and hoop iron	100 kilos	2.60
B.	Wrought iron in rough bars (tochos)[2]	do	2.60
50.	Wrought iron and steel, in large pieces, made of bar iron, or of bar or sheet iron secured together by means of rivets, destined for buildings, bridges, etc	100 kilos	3.20
51.	Iron wire[3]	do	1.60
52.	Iron nails and screws, even with brass heads	do	4
53.	Wrought-iron pipes	do	2.60
54.	Wire gauze, not further manufactured	do	6
55.	Wares of wrought iron, not elsewhere mentioned, including those enameled with porcelain and those combined with other metals; also pipes covered with sheet brass	100 kilos	8
56.	Unutilizable articles of iron	do	1
57.	Tin plate	do	5
58.	Tin-plate manufactures	do	8
59.	Needles, pens, parts of clockwork, and other similar articles of iron or steel	kilos	1.65
60.	Knives, carvers, razors, and penknives	do	.40
61.	Scissors of all kinds	do	.40
62.	Side arms and detached pieces for the same	do	.40
63.	Firearms, barrels, and detached pieces for the same[4]	do	1

GROUP 3.—*Copper and its alloys.*

64.	Copper of first fusion, and old copper	100 kilos	2
65.	Copper and brass in bars and ingots, and old brass	do	2.50
66.	Copper and brass in sheets and nails, and copper wire	do	10
67.	Copper and brass in tubes and large pieces not finished, such as bottoms of boilers, etc	100 kilos	10
68.	Brass wire	do	10
69.	Copper, brass, or bronze gauze, not worked	do	15
70.	Bronze, unworked	do	2

[1] Articles of malleable cast iron shall pay the duties stipulated for manufacturers and articles of wrought iron.

[2] By "iron in rough bars" (tochos) shall be understood rough wrought iron in a mass or prism, and round iron or iron in any other form containing dross. Wrought iron containing dross has an unequal and rough surface. Wrought iron in a mass or prism, free from dross, will be subject to duty as iron in bars. In case of doubt, this iron shall be submitted for examination to the inspector of mines, who will determine its classification.

[3] Only round iron the thickness of which does not exceed No. 1, English gauge, i. e., 8 millimeters in diameter, shall be considered as wire.

[4] In order that pieces of firearms may pay according to this number, they must be shaped and bear file marks on the outer surface.

			Pesos.
54	71. Copper, bronze, or brass, worked, and all alloys of common metal in which copper enters, in hardware, even varnished.	kilo	0.25
	72. Sail metals and alloys, in gilt, silvered, or nickeled articles	kilo	.35

GROUP 4.—*Other metals.*

	73. Tin in ingots	100 kilos	2.50
	74. Zinc in bars, lumps, or pigs	do	1.20
	75. Zinc in sheets, nails, and wire	do	5
	76. Zinc in manufactured articles, even varnished	kilo	.25
	77. All other metals and alloys not mentioned, in sheets, lumps, nails, tubes, etc	100 kilos	10
	78. The same metals, manufactured, varnished or not	kilo	.20
	79. The same metals, and zinc in gilt, silvered, or nickeled ware	do	.30

CLASS III.—SUBSTANCES EMPLOYED IN PHARMACY, PERFUMERY, AND CHEMICAL INDUSTRIES.

GROUP 1.—*Simple drugs.*

	80. Cocoanut and palm oil, and other heavy oils	100 kilos	.20
	81. Other vegetable oils, except olive oil	do	4.60
	82. Dyewoods and tannery bark	do	.02
	83. Madder or rubian	do	4
	84. Rape, flax, and other oleaginous seeds, including copra or cocoanut	100 kilos	.04
	85. Other vegetable products, not specially mentioned	do	2
	86. Animal products employed in medicine	do	.60

GROUP 2.—*Colors, dyes, and varnishes.*

	87. Ochres and natural earths, for painting	100 kilos	.02
	88. Indigo and cochineal	do	2
	89. Dyeing extracts	do	.60
	90. Garancine, pure, or mixed with madder	kilo	.15
	91. Varnishes	100 kilos	4.80
	92. Colors, in powder or in lumps [1]	do	1.50
	93. Colors, prepared, and inks	do	5
	94. Colors derived from coal, and other artificial colors [2]	kilo	.15

GROUP 3.—*Chemical and pharmaceutical products.*

	95. Muriatic and chlorhydric acid	100 kilos	.20
	96. Nitric acid	do	.80
	97. Sulphuric acid	do	.30
	98. Alkaloids and their salts	kilo	6
	99. Alum	100 kilos	.30
	100. Sulphur	do	.05
	101. Barillas, natural and artificial [3]	do	.20

[1] The colors included in this number are those composed of a metallic base, which for use are mixed with oil or turpentine and are generally insoluble in water, alcohol, or ether. They are rarely crystallized, and are almost always in powder and lumps, such as white lead, chrome yellow, vermillion, Prussian and Thenardt blue, English green, and parrot green ("papagayo").

[2] The colors classed in this number are those known as artificial or organic products, in which mineral substances rarely enter. They are generally crystallized, and are soluble in water, alcohol, or ether. They are employed in dyeing and printing, with or without mordant, rather than in painting, such as picric acid, green aldeide, English violet, rosaline and its salts, naphthaline colors, artificial alizarine, etc.

[3] By barillas, natural and artificial, are understood carbonates of soda, impure, containing carbon.

			Pesos.
55	102. Alkaline carbonates, alkalis, caustic and ammoniacal salts, except sulphate	100 kilos	0.20
	103. Chloride of lime	do	.30
	104. Chloride of potassium, sulphate of soda; chloride, carbonate, and sulphate of magnesia	100 kilos	.10
	105. Chloride of sodium (common salt)	do	.65
	106. Glues and albumin	do	2.40
	107. Phosphorus	kilo	.07
	108. Nitrate of potash (saltpeter)	100 kilos	.30
	109. Nitrate of soda and sulphate of ammoniac	do	.05
	110. Oxides of lead	do	.40
	111. Sulphate and pyrolignite of iron	do	.30
	112. Pills, capsules, jujubes, and the like [1]	kilo	1
	113. Pharmaceutical products not specified [1]	do	.80
	114. Chemical products not specified	do	.20

GROUP 4.—*Various.*

115. Starch	kilo	.02
116. Feculæ for industrial uses, and dextrine	100 kilos	.20
117. Common soap	do	3.75
118. Paraffine, stearine, wax, and spermaceti, in lumps	do	3.30
119. Paraffine, stearine, wax, and spermaceti, manufactured, and wooden matches	100 kilos	10
120. Perfumery and essences	kilo	.40
121. Gunpowder, explosive compounds, and fuses for mines	do	.10
122. Tobacco, manufactured	do	2.40
123. Tobacco, not manufactured	do	.20

CLASS IV.—COTTON AND ITS MANUFACTURES.

GROUP 1.—*Raw cotton.*

124. Raw cotton, with or without seed	100 kilos	*.24

GROUP 2.—*Cotton yarns.*

125. Cotton, spun, and yarn twisted in one or two threads, unbleached, bleached, or dyed, up to No. 35, inclusive [2]	kilo	*.25
126. The same from No. 36 upward [2]	do	*.35
127. The same twisted with three or more threads, unbleached, bleached, or dyed	kilo	.50

*Add surtax of 29 per cent on duty.

[1] The products or substances included in Nos. 112 and 113 shall be examined by the pharmaceutical inspectors, who, in conjunction with the customs, will make a declaration as follows: "The goods cleared are those expressed in the declaration and are (or are not) admitted to importation by virtue of their formulas having been published (here state where), or their composition having been discovered by analysis made by ———."

[2] To ascertain the number, according to the English system (the system adopted in this tariff), to which a cotton yarn corresponds, any number of meters of yarn may be taken, and this number is to be multiplied by the invariable factor 59 (this being the number of centigrammes a meter of cotton yarn of a single thread No. 1 weighs). The product of the above multiplication is to be divided by the number of centigrammes that the length of yarn tested may weigh. The quotient multiplied by the number of threads will then give the corresponding English number, to which 7 or 10 per cent is to be added, according as the cotton of more than one thread be only spun or spun and dyed.

56			Pesos.
	GROUP 3.—*Tissues.*		
	Close-woven tissues, plain, unbleached, bleached, or dyed, in the piece or in handkerchiefs, having:		
128 A.	Up to 25 threads, inclusive	kilo	*0.20
B.	Up to 35 threads, inclusive	do	*.32
129.	36 threads and above	kilo	*.44
	Tissues, printed, twilled, and figured in the loom, having:		
130 A.	Up to 25 threads, inclusive	do	.25
B.	Up to 35 threads, inclusive [1]	do	.40
131.	36 threads and above	do	*.55
	Tissues transparent, such as muslins, cambrics, lawns, organdies, and gauzes, of all kinds, having:		
132 A.	Up to 30 threads, inclusive	kilo	*.44
B.	31 threads and above	do	.64
133.	Quiltings and piqués	do	.50
134.	Velveteens, corduroys, and other thick tissues for wearing apparel	kilo	.52
135.	Tulles	kilo	1
136.	Lace, except crochet [2]	do	*1.25
137.	Crochet lace, made by hand or in the loom	do	.70
138.	Hosiery piece goods, jerseys and drawers	do	.50
139.	Hosiery in stockings, socks, gloves, and other articles	do	.60
	CLASS V.—HEMP, FLAX, ALOE, JUTE, AND OTHER VEGETABLE FIBERS AND THEIR MANUFACTURES.		
	GROUP 1.—*Raw.*		
140.	Hemp, raw or hackled	100 kilos	.40
141.	Flax, raw or hackled	do	.40
142.	Jute, aloe, and other vegtable fibers	do	.04
	GROUP 2.—*Yarns.*		
143.	Yarn of hemp, linen, or jute	kilo	.22
144.	Yarn of aloe, and other vegetable fibers [3]	100 kilos	1.56
145.	Threads, twisted, of two or more ends, and fishing nets	kilo	.30
146.	Cordage [4] for vessels	100 kilos	4.16
	GROUP 3.—*Tissues.* [5]		
147.	Plain tissues of hemp and flax, with or without mixture of cotton, up to 10 threads, inclusive	kilo	*.20

*Add surtax of 20 per cent on duty.

[1] The number of threads is to be ascertained by half of the threads contained in a square of 6 millimeters, counting the weft and the warp. The instrument called "thread counter" is to be employed for this purpose.

[2] Lace of a maximum width of 10 centimeters shall be dutiable according to this number; that wider, shall be included in No. 111, as tulles.

[3] As yarn of jute is considered twisted thread of one end the thickness of which is equal to or less than the English No. 1, that exceeding this number is considered as cordage. To ascertain this number, any number of meters of yarn may be taken, and this number is to be mulitplied by the factor 165 (1 meter of yarn of jute, No. 1, weighs 165 centigrams), and divided by the number of centigrams that the length of the yarn tested may weigh. The quotient will then give the corresponding English number.

[4] By the cordage paying under this heading shall be understood hemp, flax, or jute yarn, twisted in two or more strands, 10 meters of which weigh more than 5 grams.

[5] In linen tissues paying according to the number of threads the threads (both warp and woof) contained in a space of 6 millimeters will be counted.

			Pesos.
57	148. Plain tissues of hemp and flax, from 11 to 24 threads, inclusive	kilo	*0.44
	149. Plain tissues of hemp and flax, of 25 threads and above	do	*.60
	150. Plain tissues of hemp and flax, twilled or diapered	do	.40
	151. Lace, net, and crochet work	do	4.80
	152. Knitted tissues	do	1.20
	153. Plain tissues of jute, aloe or other vegetable fibers, with or without mixture of cotton	kilo	.25
	154. Twilled or diapered tissues of the same materials, with or without mixture of cotton	kilo	.50

CLASS VI.—WOOLS, BRISTLES, HAIR, HORSEHAIR, AND THEIR MANUFACTURES.

GROUP 1.—*Raw.*

	155. Bristles, horsehair and other hair, including hair of the camel, vicuña, and of the angora and cashmere goat; wool, unwashed,[1] washed, combed, or carded,[2] and waste wool, carded[3]	100 kilos	2

GROUP 2.—*Yarns.*

	156. Woolen and worsted yarns, spun and twisted, unbleached or in the grease[4]	kilo	.35
	157. Woolen and worsted yarns, washed or bleached	do	.60
	158. Woolen and worsted yarns, dyed	do	*.70

GROUP 3.—*Tissues.*

	159. Woolen carpets, pure, or mixed with other materials	kilo	*.50
	160. Felts of pure wool, or mixed with other materials	do	.20
	161. Blankets of wool, pure, or mixed with other materials[5]	do	.40
	162. Hosiery, whether mixed or not with cotton or other vegetable fibers,	kilo	.48
	163. Cloths and all other similar tissues of wool, waste wool, hair, or a mixture of these materials	kilo	.80
	164. The same tissues, when the warp is wholly of cotton or other vegetable fibers, also astrakhans and plushes of the same materials	kilo	.60
	165. All other tissues of pure wool, waste wool, hair, or a mixture of these materials	kilo	1
	166. The same tissues when the warp is wholly of cotton or other vegetable fibers	kilo	.80
	167. Tissues of bristles or hair, with or without mixture of cotton or other vegetable fibers	kilo	.70

CLASS VII.—SILK, AND ITS MANUFACTURES.

GROUP 1.—*Yarn*

	168. Silk, raw, and spun, twisted or not; floss silk, combed or carded,[6] spun, twisted or not[7]	kilo	*2.50

---

* Add surtax of 20 per cent on duty.

[1] Wool will be considered as unwashed when after having been washed with sulphuret of carbon it is found to lose more than 10 per cent of its weight.

[2] Wool the threads of which exceed 10 centimeters in length is considered as long wool.

[3] The waste from carding included in this number is that obtained from the picking and unraveling of old rags, and is almost always dyed and common. Waste resulting from the spinning of long wool shall also be classed herein.

[4] Worsted yarn will be considered unbleached or in the grease if when washed with sulphuret of carbon it loses more than 10 per cent of its weight.

[5] Plaids and the like are not included in this number. They shall pay duty according to the component tissue.

[6] All silk waste the fibers of which do not exceed 20 centimeters in length is considered silk.

58 TARIFF CIRCULAR, No. 53.

WAR DEPARTMENT,
Washington, April 17, 1899.

By direction of the President, paragraph 178, page 15, of the Customs Tariff and Regulations for the Philippine Islands, is hereby amended by the addtion thereto of the following subdivision in lieu of the third line of said paragraph relating to "Engravings, maps, and drawings:"

Prints, maps, charts, etc., drawings, photographs, engravings, and pictures; lithographs, chromolithographs, oleographs, etc., printed from stone, zinc, aluminum, or other material, used as labels, flaps, bands, and wrappers for tobacco or other purposes:

a. Of one to three printings, inclusive, including articles solely printed in bronze (bronze printing to be counted as three printings), but not including any article printed in whole or in part in metal leaf, tare, per kilogram $0.05

b. Of four to seven printings, inclusive (bronze printing to be counted as three printings), but not including any article printed in whole or in part in metal leaf, tare 0.20

c. Of eight to thirteen printings, inclusive (bronze printing to be counted three printings), but not including any article printed in whole or in part in metal leaf, tare ..... per kilogram .. 0.40

d. Of more than thirteen printings (bronze printing to be counted as three printings), including all articles printed in whole or in part in metal leaf, tare ..... per kilogram .. 0.80

This order will be duly proclaimed and enforced in the Philippine Islands.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

59			Pesos.
	GROUP 2.—*Tissues.*		
169.	Tissues, plain or twilled	kilo..	*4
170.	Velvets and plushes	do....	4.80
171.	Tissues of floss or waste silk, of raw silk, and of waste silk mixed with silk[1]	kilo..	3
172.	Tulles and lace, of silk or waste silk	do....	8
173.	Knitted tissues of silk or waste silk	do....	4.40
174.	Velvets and plushes of silk or waste silk, with the warp or weft wholly of cotton or other vegetable fibers	kilo..	3.60
175.	Other tissues of silk or waste silk, with the warp or weft wholly of cotton or other vegetable fibers	kilo..	2.30
176.	Tissues of silk or waste silk, with the warp or weft wholly of wool or hair	kilo..	2.50
	CLASS VIII.—PAPER AND ITS APPLICATIONS.		
	GROUP 1.—*Printing and writing paper.*		
177.	Paper, endless, unsized and half-sized for printing	kilo..	.06
	Paper, endless, for writing, lithographing, or engraving	do....	*.08
	Paper, cut, handmade and ruled paper	do....	.12
	GROUP 2.—*Paper, printed, engraved, or photographed.*		
178.	Books, bound or unbound, and other printed matter in Spanish,[2]	kilo..	.10
	Books, bound, in foreign languages[2]	do....	.05
	Engravings, maps, and drawings	do....	.25
	GROUP 3.—*Wall paper.*		
179.	Wall paper, with gold, silver, wool, or glass	kilo..	*.40
	Wall paper, of other kinds	do....	.10
	GROUP 4.—*Pasteboard and various papers.*		
	Straw paper, common packing paper, and sand or glass paper	kilo..	*.04
	Other paper not specially mentioned	do....	.08
180.	Cardboard in sheets, in boxes lined with ordinary paper,[3] and unfinished articles of pasteboard or "carton-pierre"	kilo..	.04
	The same articles finished, and pasteboard boxes with ornaments, or lined with fine paper or other materials	kilo..	.30
	CLASS IX.—WOOD AND OTHER VEGETABLE MATERIALS EMPLOYED IN MANUFACTURES, AND ARTICLES MANUFACTURED THEREWITH.		
	GROUP 1.—*Wood.*		
181.	Staves	thousand..	.60
182.	Ordinary wood, in boards, even cut, planed and dovetailed for boxes or floorings; planks, beams, rafters, masts, and timber for ship building	cubic meter..	.55

*Add surtax of 20 per cent on duty.

[1] All silk waste, the fibers of which do not exceed 20 centimeters in length, is considered silk.

[2] Bookbindings shall be dutiable according to the component material. When the books are stitched or bound in boards, they shall pay duty as printed matter, on gross weight. Newspapers printed abroad require no permit for their introduction into the Philippine Islands.

[3] Boxes of pasteboard lined with more or less common paper, which serve for packing handkerchiefs, shirt fronts, buttons, stuffs, etc., shall be dutiable according to this number. Paper pulp in imperforated sheets or those which are not perforated at the expense of the importer at the time of clearance shall likewise be dutiable according to this number.

			Pesos.
60	183. Fine wood for cabinetmakers, in boards, deals, trunks or logs	100 kilos..	0.11
	184. Fine wood for cabinetmakers, sawn or in veneers	do....	.90
	185. Coopers' wares, fitted together or not	do....	*2
	GROUP 2.—*Furniture and wooden manufactures.*[1]		
	186. Ordinary wood manufactured into any kind of article, turned or not, painted or varnished, and moldings carved and varnished, or prepared for gilding, also furniture of bent wood, even if painted and varnished	100 kilos..	*2
	187. Fine wood manufactured into furniture, and other wares, turned, carved, polished, or varnished, and the same wares of common wood veneered with fine wood; furniture covered with stuffs, except with silk or leather, and gilt moldings	100 kilos..	*6
	188. The same articles, gilt, inlaid or veneered with mother-of-pearl or other fine materials, and ornamented with metal, and furniture covered with stuffs of silk or with leather	100 kilos..	*10
	GROUP 3.—*Various.*		
	189. Charcoal, fire-wood, and other vegetable combustibles	100 kilos..	.10
	190. Cork	do....	.18
	191. Wooden hoops and trellis for fencing	do....	.20
	192. Rushes, esparto, vegetable hair, cane, osiers, fine straw, palm, and other analogous materials, unmanufactured	100 kilos..	.05
	193. The same materials, manufactured	do....	*6.05
	CLASS X.		
	GROUP 1.—*Animals, skins, and animal products employed in industry.*		
	194. Horses	each..	20
	195. Mules, asses, and cattle	do....	10
	196. Pigs	do....	2.70
	197. Sheep, goats, and animals not otherwise mentioned	do....	*.50
	GROUP 2.—*Skins and leather.*		
	198. Skins and hides, untanned	100 kilos..	1.20
	199. Varnished leather and calfskins, tanned or curried	kilo..	.64
	200. Other hides, tanned or cured, including sole leather	do....	.24
	201. Leather belting for machinery	do....	.20
	202. Peltries for clothing and trimming, in their natural state or prepared	kilo..	.25
	203. Peltries in made-up articles	do....	1.80
	204. Gloves of leather	do....	5
	205 A. Boots of all kinds, of leather or tissue	pair..	*.40
	B. Shoes of all kinds	do....	*.26
	C. Slippers and pumps, also common shoes generally worn by the Chinese	pair..	*.10
	D. Boots and shoes of all kinds for children shall pay one-half of the above duties, according to classification.*		
	206. Saddlers' and harness-makers' wares[2]	kilo..	*.75
	207. Other articles of leather, or lined with the same	do....	1

*Add surtax of 20 per cent on duty.

[1] Marble slabs for furniture will be taxed according to No. 2 of the tariff if they are presented separate from the objects to which they belong.

[2] Saddlers' and harness-makers' wares comprise such articles as harness, saddles, bridles, gear of horses, mules, carriages, etc., all sorts of stable trappings, articles for traveling, such as bags, portmanteaus, trunks, hat boxes, and other articles made of leather or lined with leather or skin.

61

GROUP 3.—*Feathers.*

			Pesos.
208	Feathers for ornament, in their natural state or manufactured	kilo	3
	Other feathers and feather dusters	do	.40

GROUP 4.—*Other animal remains.*

209.	Animal fats	100 kilos	*.20
210.	Animal manures of all kinds	do	.01
211.	Intestines	kilo	.04
212.	Other animal remains not mentioned, not manufactured	100 kilos	.10

CLASS XI.—INSTRUMENTS, MACHINERY, AND APPARATUS EMPLOYED IN AGRICULTURE, INDUSTRY, AND LOCOMOTION.

GROUP 1.—*Musical instruments, clocks, and watches.*

213.	Pianos [1]	each	25
214.	Harmoniums and cabinet organs	do	4
215.	Gold watches	do	4
216.	Watches of silver or of other metals	do	2
217.	Common clocks with weights, and alarm clocks [2]	do	1
218.	Works for wall clocks, or mantelpiece clocks, finished, with or without cases, and chronometers [3]	each	1.12

GROUP 2.—*Apparatus and machines.*

219.	Weighing machines	100 kilos	5.50
220.	Agricultural machines [4]	do	.20
221.	Motors	do	.50
222.	Machines of copper and its alloys, for industrial purposes, and detached parts of the same metals [5]	100 kilos	5.40
	Machines and detached parts [6] of other materials, for industrial purposes	100 kilos	1.80

---

* Add surtax of 20 per cent on duty.

[1] Strung frames for pianos shall pay as pianos, though they be not imported with all the pieces constituting that instrument.

[2] By alarm clocks shall be understood those fitted with an alarm bell and not running longer than 48 hours, whether they have the same mechanism for striking both the hours and the alarm or separate mechanisms for each.

[3] Cases, stands, glass shades, and other accessories will be dutiable as manufactured articles, according to their component material.

Clockworks for wall or table clocks, unfinished, and brass pieces for the same, will be taxed according to No. 49 of the tariff. Unfinished pieces are those which are only roughly filed, which have no escapements, the dial or hands of which are not adjusted, and the last wheel of which is not crenated. When clockworks are imported within cases, on stands, etc., and the importer does not wish to separate them for their examination, the works and the dial will be reckoned as weighing 1 kilogram and the rest will pay as stated above.

[4] These machines are those employed by farmers and agriculturists for preparing the ground and gathering the crops, as also those employed in order to clean the crops and improve them without essentially changing their nature.

[5] Machines, and separate pieces of the same, of coper and its alloys, or in combination with other materials, shall also be taxed under this heading, provided the above metals predominate in weight.

[6] It will be necessary to prove to what manufacture or to what industry woolen hose and filters are destined for them to be assessed in this number. For the definition of parts of machinery, the following rules will be observed:

First. A separate piece of a machine is understood to be any object which is not

62

GROUP 3.—*Carriages.*

			Pesos.
223.	Coaches and berlins of four seats, with or without hoods; new, used, or repaired	each	50
224.	Berlins of two seats, with or without folding seats, with or without hoods; omnibuses with more than fifteen seats; new, used, or repaired	each	25
225.	Carriages not enumerated in the above headings	do	12.50
226.	Passenger carriages for railways and tramways, and finished wooden parts for same	100 kilos	7.50
227.	All other railway carriages, and finished wooden parts for same	100 kilos	2.17
	Carts and handcarts	do	2

CLASS XII.—ALIMENTARY SUBSTANCES.

GROUP 1.—*Meat and fish.*

228.	Live and dead poultry and small game	pair	.05
229.	Meat, salted, and jerked beef	kilo	.08
230.	Pork and lard, including bacon	do	.15
231.	Other kinds of meat	do	.09
232.	Butter	do	.20
233.	Salt cod and stockfish	do	.04
234.	Fresh fish, or with the salt indispensable for its preservation	do	.01
235.	Fish, salted, smoked, and pickled	do	.06
236.	Shellfish	do	.05

GROUP 2.—*Grain and vegetables.*

237.	Rice, husked or not	100 kilos	.75
238.	Wheat	do	.60
239.	Wheat flour[1]	100 kilos	2.10
240.	Other cereals	do	.50
241.	Flour of same	do	1
242.	Pulse	kilo	.02

GROUP 3.—*Garden produce and fruits.*

243.	Garden produce	kilo	.02
244.	Fruits	do	.04

expressly specified by name under some heading of the tariff, and which by its shape, and by the manner in which it is presented for clearance in the custom-house, though not completely finished, may be considered as exclusively destined for a machine and can have no other application. If it be imported completely finished, it must pay under one of the headings of the tariff referring to machinery.

Second. The importer of detached parts of machinery may, should he deem it convenient, request, when making the clearance, that the duty be levied on the component material instead of paying the duty stipulated for machines.

Third. Tubes, bars, axles, screws, bolts, sheets, plates, boiler bottoms, wire, and other articles expressly taxed in the tariff, must pay duty accordingly, though they be destined for machinery.

Fourth. Tools, instruments, and utensils employed in the arts and industries can not be considered parts of machinery as far as the customs tariff is concerned, and must pay duty according to the materials of which they are composed.

[1] To ascertain whether products presented for clearance are flour or groats, a sample thereof shall be placed in seive No. 80 (silk tissue with 80 openings to a French square inch). If the product passes through this seive, it shall be considered as flour; if not, as groats.

63 GROUP 4.—*Colonial products.*

		Pesos.
245A. Sugar, raw	kilo	0.02
B. Sugar, refined	do	.10
246. Cocoa, of all kinds and origin	do	.12
247. Coffee, of all kinds and origin	do	.10
248. Cinnamon, of all kinds and origin	do	.12
249. Cloves	do	.14
250. Pepper	do	.07
251. Tea, of all kinds and origin	do	.20

GROUP 5.—*Oils and beverages.*

252. Olive oil	kilo	.12
253. Common brandy of vinic alcohol	liter	.09
254A. Brandy flavored with aniseed, composed brandies, and liqueurs of vinic alcohol	liter	.20
B. Common brandy, flavored with aniseed, composed brandies, and liqueurs, not exclusively made of vinic alcohol, i. e., those known as industrial	liter	.36
255. Beer and cider in wood, 5.50 per hectoliter; in bottles, 7.75 per hectoliter.		
256. Wines, sparkling	liter	.25
257. Wines, other	do	.12

GROUP 6.—*Seeds and forage.*

258. Seeds not mentioned, and carob beans	100 kilos	.32
259. Forage and bran	do	.10

GROUP 7.—*Various.*

260. Alimentary preserves, pork-butchers' produce, mustard, and sauces	kilo	.20
261. Chocolate	do	.20
262. Sweetmeats	do	.20
263. Egg	hundred	.25
264. Pastes for soups, alimentary feculæ, bread, and unsweetened biscuit	kilo	.04
265. Cheese	do	.15
266. Honey and molasses [1]	do	.01

CLASS XIII.—VARIOUS.

267. Ornaments of every kind, not mentioned in the following numbers, other than those of gold or silver	kilo	3
268. Amber, horn, jet, whalebone, bone, tortoise shell, coral, meerschaum, ivory, mother-of-pearl and paste, in the rough or cut, even in strips or sheets	kilo	.01
269. Amber, jet, tortoise shell, coral, ivory, mother-of-pearl, and aventurine, manufactured in ornaments of all kinds	kilo	5
270. Horn, whalebone, meerschaum, bone, and paste in imitation of the substances last above specified, manufactured	kilo	.50
271. Walking sticks, and sticks for umbrellas and parasols [2]	hundred	5
272. Buttons of all sorts, except those of gold or silver	kilo	1

[1] Honey and treacle, which is the viscous residue of crystallized sugar, of a reddish-brown color more or less intense, and of a sweet but somewhat bitter taste, will also be appraised by this article. It weighs from 1,374 to 1,427 grams per liter, and at 15° C. registers from 40 to 44° Baumé.

[2] Sword sticks shall pay the duty fixed for the swords they contain, and shall, in addition, pay as walking sticks.

64			Pesos.
273.	Cartridges, without projectiles or bullets, for firearms, the importation of which is permitted	kilo	.11
274.	Cartridges, with projectiles or bullets, for the same firearms	do	.15
275.	Percussion caps for firearms	do	.12
276.	Cases of fine woods, leather, and those lined with silk, and other of similar kind, with or without fittings for writing, sewing, and toilet purposes, or to contain perfumery, liquids, or comestibles	kilo	1.50
277.	The same of common woods, cardboard, wicker, and other of similar kind, with or without fittings for the aforesaid purposes	kilo	.60
278.	India rubber and gutta-percha, unmanufactured	100 kilos	.60
279.	India rubber, in sheets and tubes	kilo	.15
280.	India rubber, in threads	do	.10
281.	India rubber, manufactured in any shape or into any kind of article	kilo	.44
282.	Oilcloths and tarpaulin, for floors and packing purposes	do	.07
283.	Oilcloths and tarpaulin, of other classes	do	.16
284.	Toys and games, except those of tortoise shell, ivory, mother-of-pearl, gold, or silver	kilo	.22
285.	Wicks for lamps and candles	do	.12
286.	Silk umbrellas and parasols	each	.60
287.	Umbrellas and parasols covered with other stuffs	do	.28
288.	Trimmings of silk [1]	kilo	2.80
289.	Trimmings of wool [2]	do	1.40
290.	Trimmings of all other kinds	do	.80
291.	Oil paintings [3]	each	.20
292.	Straw hats and bonnets	do	.32
293.	Other sorts of hats and bonnets, trimmed and finished [3]	do	.40
294.	Hats, not trimmed, and bonnets	do	.20
295.	Hats and bonnets, of all kinds and of any material, with milliners' work	each	1.50
296.	Elastic tissues with admixture of other materials [4]	kilo	.80

EXPORT DUES.

On the products of the Philippine Islands when exported therefrom there shall be levied and collected an export tax as follows:

			Pesos.
297.	Abaca, raw or wrought hemp	100 kilos gross	0.75
298.	Indigo	do	.50
299.	Indigo employed for dyeing ("tintarrón")	do	.05
300.	Rice	do	2
301.	Sugar	do	.10
302.	Cocoanuts, fresh and dried (copra)	do	.10
303.	Tobacco, manufactured, of all kinds and of whatever origin	do	3
304.	Tobacco, raw, grown in the provinces of Cagayan, Isabela, and New Biscay (Luzón Islands)	100 kilos gross	3
305.	Tobacco, raw, grown in the Visayas and Mindanao islands	do	2
306.	Tobacco, raw, grown in other provinces of the archipelago	do	1.50

[1] Trimmings which contain more than 40 per cent of silk of their total weight shall pay duty as silk trimmings.

[2] Trimmings which contain more than 40 per cent of wool, or of wool and silk, of their total weight shall pay as woolen trimmings.

[3] Felt hats shall be considered as trimmed when they have more work than what is indispensable to shape the crown.

[4] All tissues covered on one or both sides with india rubber, also those with interior linings of this material, are comprised in this number.

65 TARIFF CIRCULAR, No. 43.

WAR DEPARTMENT,
Washington, March 30, 1899.

By direction of the President, the "Articles free of duty," page 21 of the "Customs Tariff and Regulations for Ports in the Philippine Islands," is hereby amended by the addition thereto of the following paragraph:

320½. Articles of the growth, produce, and manufacture of the Philippine Islands exported to a foreign country and returned without having been advanced in value or improved in condition by any process of manufacture or other means, and upon which no drawback or bounty has been allowed.

This order will be duly proclaimed and enforced in the Philippine Islands.

G. D. MEIKLEJOHN,
Acting Secretary of War.

66 307. When necessary to prove the place of production of raw tobacco, the customs officers shall require the delivery of certificates of origin.

EXCISE AND OTHER INLAND CHARGES.

		Pesos.
308. On distilled spirits, in casks	per liter	0.20
309. On distilled spirits, in bottles or flasks	do	.30
310. On beer, of all kinds	do	.10
311. On cigars and cigarettes, stamp tax on all which shall be manufactured and sold or removed for consumption and sale	per M	1.00

ARTICLES FREE OF DUTY.

The following articles shall pay no duty on their importation into the Philippine Islands:

312. Mineral waters.

313. Trees, shoots, and plants, also moss, in a natural or fresh state.

314. Lime (oxide of calcium).

315. Copper, gold and silver ores.

316. Samples of felt, painted paper, and tissues, when they comply with the following conditions:

When they do not exceed 40 centimeters in length, measured in the warp or length of the piece, even when such samples have the entire width of the piece. The width shall be determined, for tissues, by the list, and for felts and painted paper by the narrow border which has not passsed through the press.

Samples not having these indications will only be admitted free of duty when they do not exceed 40 centimeters in any dimension.

In order to avoid abuses the samples declared for free entry must have cuts at every 20 centimeters of their width, so as to render them unfit for any other purpose.

317. Samples of trimmings in small pieces, of no commercial value or possible application.

318. Gold, silver, and platinum, in broken-up jewelry or table services, bars, sheets, coins, pieces, dust, and scrap.

319. Gold, silver, and platinum, in articles manufactured and stamped in the Philippine Islands.

320. Gympsum (sulphate of lime).

ARTICLES FREE OF DUTY, SUBJECT TO THE FOLLOWING CONDITIONS.

321. Wearing apparel, toilet objects and articles for personal use, bed and table linen, books, portable tools and instruments, theatrical costumes, jewels, and table services bearing evident signs of having been used, imported by travelers in their luggage in quantities proportionate to their class, profession, and position.

When travelers do not bring their baggage with them the clearing of the same may be made by the conductor or persons authorized for the purpose, provided they prove, to the satisfaction of the administration, that the effects are destined for private use.

67 Works of fine art acquired by the Government, academies, or other official corporations, and destined for museums, galleries, or art schools, when due proof is given as to their destination.

Archæological and numismatical objects for public museums, academies, and scientific and artistic corporations, on proof of their destination.[1]

Specimens and collections of mineralogy, botany, and zoology, and small models for public museums, public schools, academies, and scientific and artstic corporations, on proof of their destination.

If the regulations in each case are not complied with, or if the examination be not entirely satisfactory, the exemption will be annulled and the duties stipulated in the tariff will be collected.

ARTICLES FREE OF DUTY, SUBJECT TO THE FORMALITIES DETERMINED FOR EACH CASE BY THE CUSTOMS REGULATIONS.

322. Casks, sacks, and large recipients of metal, imported with goods dutiable separately from such recipients and when they are to be exported.

323. Carriages, trained animals, portable theatres, panoramas, wax figures and other similar objects for public entertainments, imported temporarily.

324. Furniture of persons coming to settle in the Philippine Islands, which has been in use by them.

325. Foreign articles destined to exhibitions held in the Philippine Islands.

326. Submarine telegraph cables.

327. Pumps intended for the salvage of vessels.

328. Parts of machinery, pieces of metal, and wood imported for the repair of foreign vessels which have entered ports of the Philippine Islands through stress of weather.

GOODS NOT SPECIALLY CLASSED IN THE TARIFF.

329. Yarns composed of two or more textile materials shall pay the duty assessed on the material paying the higher duty.

The warp of tissues is to be considered as the totality of the threads which lie in the longitudinal sense, whether they form the foundation of the same or whether they may have been added in order to form patterns or to give more body to the stuff, even though such threads may be cut or show a want of continuity. The weft shall be considered the totality of the threads which cross the warp of the

[1] Reproductions shall be classified as artistic works when only one copy of each original is imported and when intended for any of the above-mentioned official corporations, on condition that these reproductions are cast in gypsum or bronze. Copies imported by merchants or private persons shall not enjoy this exemption, as the free entry is only granted on proof that the copies are intended for public establishments.

68 tissue and combine the same conditions of helping to form patterns or add to the body of the stuff.

330. Tissues with the warp of cotton and the weft of another vegetable material, or vice versa, shall pay in accordance with the numbers of group 3 of class 5 to which they correspond, according to their nature.

Tissues which have the weft entirely made up of cotton and the warp entirely of wool or of wool and cotton, whatever the proportion of the mixture may be, shall be considered as woolen tissues mixed with cotton.

Tissues composed of two materials shall be taxed as follows:

a. Tissues composed of vegetable fibers and those of wool or hair, the weft or warp of which is mixed with silk or floss-silk threads, shall not be considered as tissues mixed with silk when the weight of this material does not exceed 5 per cent of the total weight of the tissue.

b. Tissues the warp or weft of which is composed of threads of vegetable fibers and silk, or of threads of wool, hair, and silk, shall be taxed as tissues of vegetable fibers or of wool or of hair when the weight of the silk on both sides of the stuff does not exceed 5 per cent of the total weight of the tissue. If the silk threads surpass 5 per cent but do not exceed 10 per cent the tissues shall be taxed as silk tissues mixed, according to numbers 174 to 176 of the tariff; if they exceed 10 per cent they shall be taxed according to numbers 169 to 173, according to the class and nature of the tissue.

c. Tissues the warp of which is composed of silk and the weft of cotton or other vegetable fibers mixed with silk, and those of which the warp is of silk and the weft of wool or hair mixed with silk, shall always be classed as pure silk tissues, and the numbers relating to such tissues shall be applied according to their class and nature, whatever be the proportion of silk in the weft. The same rule shall be observed when the weft is entirely composed of silk and the warp of mixed materials.

Tissues composed of threads of three different materials shall pay as follows:

Warp or weft.	Weft or warp.	Will be considered as—
Cotton threads	Flax or hemp threads and those of other vegetable fibers.	Tissues of flax or hemp.
Threads of vegetable fibers	Threads of vegetable fibers and those of wool or ha r.	Tissues of vegetable fibers mixed with wool.
Do	Threads of vegetable fibers and silk.	Tissues of vegetable fibers mixed with silk.
Do	Threads of wool and silk	Do.
Threads of wool or hair	Threads of two or more vegetable fibers.	Tissues of vegetable fibers mixed with wool.
Do	Threads of vegetable fibers, wool, or hair.	Tissues of wool.
Do	Threads of vegetable fibers and silk.	Tissues of wool mixed with silk.
Threads of silk	Threads of different vegetable fibers.	Tissues of vegetable fibers mixed with silk.

69 Warp or weft.	Weft or warp.	Will be considered as—
Threads of silk	Threads of vegetable fibers and wool or hair.	Tissues of silk mixed with wool.
Threads of cotton, flax, or hemp.	Threads of flax, hemp, or other vegetable materials.	Tissues of hemp or flax.
Threads of vegetable fibers, and wool or hair.	Threads of vegetable fibers and silk.	Tissues of wool mixed with silk.
Do	Threads of vegetable fibers, wool, and silk.	Do.
Threads of vegetable fibers, wool, and silk.	.....do	Tissues of silk.
Threads of cotton and floss silk..	Threads of wool and floss silk....	Tissues of floss silk.
Threads of wool	Threads of wool, cotton, and silk.	Tissues of silk mixed with wool.

When the highest taxed thread, whether weft or warp, entering in tissues composed of three or more different materials does not exceed by 10 per cent the total weight of the tissue, such thread shall not be considered in the payment of duties, and the duty on tissues mixed with other materials shall be applied.

331. Tulles shall pay the duty on the material forming the ground, and should this be mixed, the duty of the predominant material.

332. Shawls with fringes shall pay, including the weight of fringes, according to the class of the tissue of which they are made.

Tissues embroidered by hand or machine, not in a loom, and those mixed with fine or imitation metals, whether embroidered or not, shall pay the duty corresponding to their class, with a surtax of 50 per cent.

333. Ready-made clothing, including body linen, whether completely finished or only stitched or seamed, and knitted tissues, festooned, shall pay on their total weight the duties fixed for the material of which they may be composed in their exterior part, with a surtax of 50 per cent.

334. Articles of clothing made of knitted tissues are exempt from the above-mentioned additional duty, and will pay duty according to the respective tariff number without any increase, on condition, however, that they have not been cut from the piece and have not passed through the hands of tailors or milliners. In the latter case they will be subject to the additional duty levied on ready-made clothing and linen articles.

335. Wreckage of foreign vessels lost on the coasts of the Philippine Islands shall pay 8 per cent ad valorem on their selling price at public auction. This sale shall be effected conformably to the formalities prescribed by the ordinances.

336. Floating docks, whatever their power, size, or construction, shall pay a duty of 6,250 pesos.

337. The duty on articles composed of two or more materials shall be levied according to the following rules:

a. In cases not provided for in the tariff, and when the value of the article is determined by the exterior material, the classification shall be made according to the corresponding number of this material.

70 *b.* Articles which, by their nature and application, are composed of two different materials (for instance, tools of iron) shall be taxed according to the material predominating in weight.

c. When the mixture of different materials has been made in order to evade the payment of the duties on any article, as, for instance, a mixture of flour and bran, of earth and a soluble chemical product, the duty of the material paying the highest duty shall be levied.

PACKAGES AND RECIPIENTS.

338. By exterior package is understood that which is vislble when the package is unopened. All the others contained therein are considered to be interior packages.

The following articles shall pay on the gross weight when they are contained in a single package:

Oils and greases; meat, fish, and intestines when imported in brine; scales and machinery; chemical products and drugs; also all other articles enumerated in Nos. 27, 29, 32, 37, 77, 86, 87, 183, 189, 192, 202, 210, and 212, tariff schedules.

339. Should any of the articles mentioned in the preceding paragraph be imported in two or more packages, or in packets contained in the exterior package, only the weight of the interior packages or packets shall be included in the weight of the goods.

All other goods, including buttons and haberdashery, packed in pasteboard boxes, shall pay duty on paper wrappings, ribbons, packets, or interior packages, provided always that they are not fancy boxes, etc., assessed separately.

340. Boxes and cases in general, paper wrappings or cardboard for shirt fronts, and paper used for wrapping up shawls of Chinese silk, the exterior covering as well as the paper placed between the folds, and the fine gold foil, shall be taxed separately under their proper class.

341. Percussion caps for firearms, hooks and eyes, pins, eyelet holes of metal, detached buttons, steel pens, games and toys, instruments of science and art, and other similar objects, shall pay with the weight of the interior cases or boxes containing them, and in which they are generally retailed.

342. Vessels containing alkaloids and their salts, brandy, liqueurs, beer, cider, and wines shall be assessed separately, according to their respective materials.

343. The rollers, boards, and pieces of cardboard around which fabrics are wrapped, including wire gauze, oilcloth, trimmings, ribbons, etc., as well as the cardboard bobbins on which yarn is wound, shall be deducted from the dutiable weight of such articles.

344. Articles contained in double sacks, or in a sack and another distinct covering, shall be assessed with that immediately covering the goods. Tea shall be taxed with all the interior packages.

345. Casks, barrels, and large metal receptacles shall pay duty ac-

71 cording to their class, except when they contain goods which pay on the gross weight.

346. Sacks, and packing cloth sewen in shape of sacks, serving as packages, shall pay 2 centimes of a peso each, except when they contain goods which pay on the gross weight.

347. When goods subject to duty on the gross weight and articles paying on the net weight are contained in one and the same exterior package the gross weight shall be proportionately reduced.

348. When packages of goods are subject to a higher duty than the goods themselves, being other than those generally employed, or when they can be used for another purpose, they shall be taxed at the rate corresponding to their class.

TABLE ALLOWANCE.

349. The following percentage shall be deducted, as tare, from the gross weight of the goods mentioned below:

	Per cent.
Steel, in cases	10
Cinnamon, in boxes	20
Cinnamon, in bags	8
Phosphorus, in tin boxes	30
Phosphorus, in tin boxes inclosed in wooden boxes	50
Garancine, in sacks	20
Yarns, in bales	3
Tin plate, in cases	10
Faïence, porcelain, and fine earthenware, in cases or casks	30
Faïence, porcelain, and fine earthenware, in crates	16
Glass and crystal, hollow or flat, silvered or not, in cases or casks	40
Glass and crystal, in crates; and common thin window glass, in a single box	20

350. Glass and crystal contained in crates are not subject to the above tare. By crate is meant a box made of boards, such boards being separated one from the other in such manner that the open spaces between them are equal to, or larger than, the boards themselves.

351. The above-mentioned tares shall be deducted even when the packages contain other goods not subject to the legal tare, provided, however, that such goods do not exceed 50 per cent of the gross weight. When they exceed this limit the provisions of this disposition shall not be applied, and the packages shall be taxed according to their class.

Special tare allowance.

	Per cent.
Cotton and flax thread on wooden spools: For the spools only	30
Silk and floss-silk thread on wooden spools: For the spools only	45
Trimmings, etc.: For the interiors of wood, paste, or similar materials, except those of textile materials (of the net and exclusive weight of the articles)	10
Perfumery, in flasks, pots, and small boxes, for retail sale: For all the interior packages and recipients	25

352. Soaps, essences for liqueurs, and perfumery not imported in the form above mentioned shall pay with interior packages and receptacles.

72 Whenever duties are assessed according to weight, a proper allowance shall be made for the weight of the outside case, cask, or other package containing the goods, unless otherwise provided for; and duties shall be assessed upon the weight or quantity of the contents as actually found on arrival, but no allowance shall be made for damage occurring on the voyage, except in case of marine disaster.

REIMPORTATION OF NATIONAL PRODUCTS.

353. Goods, fruits, and articles of the Philippine Islands exported abroad and reimported owing to their not having been sold at the place of destination shall be exempt from the payment of duty, provided always that they are inclosed in the same packages and bear the same marks, and that they are accompanied by certificates of the consular officer or, should such functionary not exist, of the local authority, attesting that the goods, produce, or effects of the country are reimported for the above-stated reason.

354. Abaca, raw, is exempt from the production of the aforesaid certificate. The following articles may likewise be imported free of duty:

355. Paintings which are works of art, and have been exported with a custom-house certificate, provided that on their return the number of that document is stated or its duplicate produced for comparison with the original.

356. Books, when, on their exportation, the number of the copies the title of the work, and the name of the editor have been stated in the export certificate.

357. Copper coins returned from foreign countries, if on examination it is seen that they have been coined legitimately.

358. Articles returned from foreign exhibitions.

359. Articles of the Philippine Islands returned from foreign countries, the entry of which was prohibited in the place of destination.

ARTICLES PROHIBITED.

360. Arms of war, projectiles, and their ammunition, except with special consent of the military authorities.

361. Paintings, figures, or any other objects offensive to morality.

MISCELLANEOUS PROVISIONS.

362. Exemptions and reductions shall in no case be granted in favor of any industry, public establishment, corporation, society, order, or person, whatever their character, except as provided for herein.

363. Articles purchased with the funds of the Government of the United States, for its use, and material of all kinds intended for works executed by the provisional administrations, and not by contract, shall be exempt from import duty.

73 364. The metrical system of weights and measures in use by the Spanish Government will be continued. The kilogram is equivalent to 2.2046 pounds.

365. The monetary unit of the Philippines is the gold peso, of the mint. Estimate of value, $1.034.

366. The current money heretofore in circulation in the Philippines shall be received for duties, taxes, and other exactions, in the manner and upon the same basis of valuation theretofore prevailing as that in use prior to the military and naval occupation.

367. The foregoing schedules and provisions, based upon the tariff and taxing laws heretofore in operation in the Philippine Islands, including such other taxes and exactions heretofore collected, as in the discretionary judgment of the commanding general shall be considered proper and necessary, shall be and remain in force until duly modified, suspended, or revoked.

APPENDIX.

FORM OF INVOICE.

_____, *189* .

Invoice of _____ *consigned*

to _____, *at* _____, *for sale on*

account of _____, *shipped by* _____,

per _____.

Marks and numbers.	Description.	Value.	Amount.	Consular corrections.

(Signature of owner or agent.) _____.

_____.

Indorsements.

CONSULAR CERTIFICATE.

I, the undersigned, _____, do hereby certify that, on this _____ day of _____, A. D. 189 . the invoice described in the indorsement hereof was produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the actual market value or wholesale price of the merchandise described in the said invoice in the principal markets of the country at the time of exportation is correct and true, excepting as noted by me upon said invoice or respecting which I shall make special communication to the proper authorities. I further certify _____

_____

Witness my hand and seal of office the day and year aforesaid.

Received _____, equal to $2.50, United States gold.

_____.

United States _____.

DECLARATION OF OWNER OR HIS DULY AUTHORIZED AGENT COVERING GOODS SHIPPED WITHOUT SALE.

I, the undersigned, do solemnly and truly declare that I am the _____ of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at _____, whence said merchandise is to be exported to the United States; that said invoice contains the actual market value of wholesale price of the said merchandise at the date hereof in the principal markets of _____; that said actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which

75 I would have received and was willing to receive for such merchandise sold in the ordinary course of trade in the usual wholesale quantities, and that it includes all charges thereon and the actual quantity thereof, and that no different invoice of the merchandise mentioned in the said invoice has been or will be furnished to anyone. I further declare that it is intended to make entry of said merchandise at the port of _____, in the _____ I further declare _____

_____

_____

_____

_____

Dated at _____, this _____ day of _____, 189 .

_____,

_____.

Invoice No. ——. Issued in { TRIPLICATE. / QUADRUPLICATE.

_____

AT

_____

Date _____, 189 .

Consignor _____

_____

Consignee _____

_____

Name of vessel _____

Port of shipment _____

Port of arrival _____

Port of entry _____

Value _____

Contents _____

Custom-house indorsement.*

No. ———

Importer _____

Vessel _____

From _____

Arrived _____

KIND OF ENTRY.

_____

MARKS, QUANTITY, AND CONTENTS.

* Consular officers will leave all of above indorsement blank. It is to be filled in only at the custom-house at the port of entry.

76

FORM OF ENTRY.

Import Entry, No. —

Office _____ *189* .

Entry of merchandise, imported on the ____ *day of* ____ *189* ____ *by* _____ *in the* _____ *from* _____ *to* _____ *and transported to this port, by the* _____. *Invoice No.* ____ *dated* _____ *18* ____.

Marks.	Nos.	Packages and contents.					

FORM OF PERMIT TO LAND AND DELIVER GOODS.

UNITED STATES PROVISIONAL CUSTOMS SERVICE,
Port of _____,
_____, *189* .

To the _____:

We certify that _____ has paid, or secured to be paid, the duties on merchandise contained in the following packages, in conformity to the entry thereof of this date; which merchandise was imported in the _____ master, from _____

Permission is accordingly hereby given to land and deliver the same, viz:

Marks.	No.	Description of merchandise.	

_____, _____,

_____. _____

77 FORM OF PERMIT TO LAND AND DELIVER FREE GOODS.

UNITED STATES PROVISIONAL CUSTOMS SERVICE,

Port of _____,

_____, *189* .

To the _____:

We certify that _____ has made due entry, according to law, of the following merchandise, imported in the _____ _____ master, from _____ which being exempt from duty by law, permission is hereby given to land and deliver the same, viz:

Marks.	Nos.	Description of merchandise.	

_____, _____,

_____. _____.

MASTER'S OATH ON ENTERING FOREIGN VESSEL.

I, _____, do solemnly, sincerely, and truly swear that the report and manifest subscribed in my name, and now delivered by me to the _____ of the port of _____, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, including packages of every kind and nature whatsoever, which were on board the _____ at the time of her sailing from the port of _____, or which have been laden or taken on board at any time since, and that the packages of the said goods are as particularly described as in the bills of lading signed for the same by me or with my knowledge; that I am at present, and have been during the voyage, master of the said vessel; that no package whatsoever, or any goods, wares, or merchandise, have been unladen, landed, taken out, or in any manner whatever removed from on board the said _____ since her departure from the said port of _____, except such as are now particularly specified and declared in the abstract or account herewith, and that the clearance and other papers now delivered by me to the _____ are all that I now have or have had that anyway relate to the cargo of said vessel. And I do further swear that the several articles specified in the said manifest as sea stores for the cabin and vessel are truly such, and were bona fide put on board the said _____ for the use of the officers, crew, and passengers thereof, and have none of them been brought, and are not intended by way of merchandise, or for sale, or for any other purpose than above mentioned, and are intended to remain on board for the consumption of the said officers and crew. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise, of any nature or kind whatsoever, than are contained in the report and manifest subscribed and now delivered by me, I will immediately, and without delay, make due report thereof to the _____ of the port of _____. And I do likewise swear that all matters whatsoever in the said report and manifest expressed are, to the best of my knowledge and belief, just and true.

* I further swear that no officer of the customs has applied for an inspec-

* This clause to be omitted if the vessel has been boarded by a _____ officer.

78 tion of the manifest of the cargo on board the said vessel, and that no certificate or indorsement has been delivered to me on any manifest of such cargo.

I do further, as required by law, solemnly swear that I have, to the best of my knowledge and belief, delivered, or caused to be delivered, into the post-office at or nearest this port every letter and every bag, parcel, or package of letters that were on board the said vessel during her last voyage, and that I have so delivered, or caused to be delivered, all such letters, bags, parcels, and packages as were in my possession or under my power or control.

I further swear that said vessel sailed from the said port of _____ on the _____ day of _____, 189 .

_____

Master.

Port of _____

Sworn before me this _____ day of _____, 189 .

_____

MASTER'S OATH ON ENTERING AMERICAN VESSEL.

I, _____, do solemnly, sincerely, and truly swear that the report and manifest subscribed in my name, and now delivered by me to the _____ of the port of _____, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, including packages of every kind and nature whatsoever, which were on board the _____ at the time of sailing from the port of _____ or which have been laden or taken on board at any time since, and that the packages of the said goods are as particularly described as in the bills of lading, signed for the same by me or with my knowledge; that I am at present, and have been during the voyage, master of the said vessel; that no package whatsoever, or any goods, wares, or merchandise, have been unladen, landed, taken out, or in any manner whatever removed from on board the said _____ since her departure from the said port of _____, except such as are now particularly specified and declared in the abstract or account herewith, and that the clearance and other papers now delivered by me to the collector are all that I now have or have had that anyway relate to the cargo of the said vessel, or to any transaction with United States consular officers respecting the crew or the cargo of said vessel or the vessel itself, and that the statement of services performed by consular officers contains only such services as were necessarily and actually performed at my request; and I further swear that in all cases where consular services were required and performed statements of such services were given me by such consular officers, except at the ports of _____

_____

_____

And I do further swear that the several articles specified in the said manifest as sea stores for the cabin and vessel are truly such, and were bona fide put on board the said _____ for the use of the officers, crew, and passengers thereof, and have none of them been brought, and are not intended by way of merchandise or for sale or for any other purpose than above mentioned, and are intended to remain on board for the consumption of the said officers and crew. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise of any nature or kind whatsoever, than are contained in the report and manifest subscribed and now delivered by me, I will immediately, and without delay, make due report thereof to the collector of the port of _____. And I do likewise swear that all matters whatsoever in the said report and manifest expressed are, to the best of my knowledge and belief, just and true.

*I further swear that no officer of the customs has applied for an inspection of the manifest of the cargo on board the said vessel, and that no certificate or indorsement has been delivered to me on any manifest of such cargo.

I do further, as required by law, solemnly swear that I have, to the best of my knowledge and belief, delivered or caused to be delivered, into the post-office at or nearest this port, every letter and every bag, parcel, or pack-

*This clause to be omitted if the vessel has been boarded by a customs officer.

79 age of letters that were on board the said vessel during her last voyage, and that I have so delivered, or caused to be delivered, all such letters, bags, parcels, and packages as were in my possession or under my power or control.

And further, that all mails placed on board the said vessel at or before her last clearance from a port in the United States to a foreign port have been in good faith delivered at such foreign port in accordance with the requirements of law.

I further swear that the register of the said _____, herewith presented, contains the names of all persons who are now owners thereof except *

_____

_____

and that no foreign subject or citizen hath, to the best of my knowledge and belief, any share, by the way of trust, confidence, or otherwise, in the said vessel.

†

_____

I further swear that no part of the crew of the said vessel has been impressed or detained in the course of the last voyage by any foreign power.

I further swear that the said vessel sailed from the said port of _____ on the _____ day of _____, 189 .

_____,

Master.

Port of _____

Sworn before me this _____ day of _____, 189 .

_____,

_____.

* Here state changes, if any, that have occurred in the ownership.

† Or, if the vessel is owned by an incorporated company (R. S., 4313), say: "Exhibits the true and actual ownership of said vessel, pursuant to the acts of March 3, 1825, and June 11, 1858."

INDEX.

A.

	Paragraph.
Abaca, returned	354
Accounts, money, how to be kept	21
Alimentary substances	228–236
Amber	268, 269
Animal fats	209–212
Animals	194–197
Appraisement, merchandise	9
Art, works of	321

B.

Baggage of travelers	321
Beer	255
Excise tax	310
Benzine	31
Books	178
Returned	356
Bran	259
Brandy	253, 254
Bread	264
Buttons	272

C.

Cargo—	
Not entered within ten days to be stored at expense of goods	3
To be accounted for before clearance of vessel	3
Carriages	223–227
Cartridges	273–274
Cases, wood or leather	276–277
Casks as coverings	322
Charcoal	189
Charges, wharf, on merchandise	17
Cheese	265
Chemical products	95–114
Chocolate	261
Cider	255
Cigars and cigarettes, excise tax	311
Clocks	215–218
Clothing, ready-made	333, 334
Coal	28
When exempt from duty	19, 20
Coaches	223–227
Coastwise cargoes, duties on	13
Cocoa	246
Cocoanuts, export tax	302

81

	Paragraph.
Coffee	247
Coins, copper, returned	357
Coke	28
Colors	87-94
Copper and its alloys, and manufactures of	64-72, 244
Cork	190
Cottons, and manufactures of	124-139
Coverings, meaning of term	338-348
Cutlery	60-62
D.	
Docks, floating	336
Domestic goods returned	353
Drugs	80-86
Duties—	
By whom received	21
Coastwise cargoes	13
Current money received for	366
Merchandise for use of United States, free	19, 23
Not paid within ninety days, merchandise to be sold	14
Objections to rates to be filed before payment and delivery	10
To be paid before delivery of merchandise	12
Duty—	
Articles for use of United States	363
Exemptions from, rules for	362
Rates, modification of	367
Dyes	87-94
Dyewoods and tannery bark	82
E.	
Earthenware	37-40
Eggs	203
Entry, merchandise	8
Examination, merchandise	9
Exemptions—	
Duties for harbor improvements	20
From duty, rules for	362
Exhibitions—	
Foreign articles for	325
Foreign, articles returned from	358, 359
Export dues on products of Philippine Islands	297-305
F.	
Feathers	208
Firearms	63
Fish	234-236
Flour	241
Forfeiture, merchandise fraudulently invoiced to be forfeited	11
Free entry, supplies for use of the Army and Navy of the United States	23
Fruits	243, 244
Furniture	186-188
G.	
Glass and glassware	33-36
Grain	237-242

82		Paragraph.
	Gunpowder	121
Gypsum, free		320

H.

Harbor and improvement charges on imports	20
Hemp—	
And manufactures of	140–154
Export tax	297
Raw	140–142
Yarns of	143–146
Hides	198–207
Honey	266
Hosiery	162

I.

Immigrants, effects of	324
Importations prohibited	360–361
India rubber, and manufactures of	278–281
Indigo, export tax	298, 299
Invoice, to be in currency of country of export	8
Iron, and manufactures of	43–56

J.

Jewelry	41, 42
Old, free	318, 319
Other than	267

K.

Kilogram, weight of	364

L.

Leather, and manufactures of	198–207
Light dues—	
Vessels	5
Vessels, exemption of	6
Lime, free	314

M.

Machinery	219–222
Manifest—	
Cargoes of vessels to be filed before clearance	4
To be certified by consul at port of export	2
Marble, and manufactures of	24–27
Measures and weights	364
Meat, all kinds	228–236
Merchandise—	
Change of destination	16
Duties not paid in ninety days, to be sold	14
Entry of	8
Entry of, to be signed by importer	8
Examination of	9
For use of United States, exempt from duty	19
Fraudulently invoiced, to be forfeited	11
No delivery of, until payment of duties	12

83 Merchandise—Continued.	Paragraph.
Not manifested, additional duties on	1
Of two or more materials	337
Wharf charges	18
Metals, and manufactures of	41–63
Metrical system, weights of	364
Mineral waters, free	312
Molasses	206
Monetary unit, value of	365
Musical instruments	213, 214
N.	
Naptha	30
O.	
Oilcloths	282, 283
Oil, olive	232
Oils—	
Other than vegetable	81
Cocoanut and palm, and other heavy oils	80
Ores	32
Gold, silver, and copper, free	313
P.	
Paintings—	
Oil	291
Returned	355
Paper, and manufactures of	177, 179, 180
Paraffin, and manufactures of	118, 119
Percussion caps	275
Perfumery, and essences of	120
Petroleum	30, 31
Porcelain	37–40
Port charges, vessels	5
Pottery	37–40
Public—	
Entertainments, articles for	323
Offices and other buildings	22
R.	
Records, how to be kept	21
Refund, duties, not made after delivery of goods	10
Rice, export tax	300
S.	
Samples free	316, 317
Sauces	260
Seeds	258
Rape, flax, including copra	84
Seized goods, sale of	15
Shawls with fringes	332
Silk, raw, spun, and manufactures of	168–176
Soap	117
Specimens for public institutions	321
Spices, all kinds	248–250

		Paragraph.
84	Spirits, distilled, excise tax	308, 309
	Starch	115
	Steel, and manufactures of	43–56
	Stone, and manufactures of	27
	Sugar	245
	Export tax	301
	Sweetmeats	202
	T.	
	Tar, bitumen, etc	29
	Tare, allowance for	349–352
	Tea	251
	Telegraph cables, submarine	326
	Tin, and manufactures of	73–79
	Tin plates, and manufactures of	57, 58
	Tobacco	122, 123
	Export tax	303–307
	Tonnage, vessels	7
	Tortoise shell	268, 269
	Toys	284
	Trees and plants free	313
	Tulles, duty on	331
	U.	
	Umbrellas	286, 287
	Unclaimed goods, sale of	14
	United States, articles imported for	363
	V.	
	Varnishes	87–94
	Vessel, manifest of outward cargo to be filed before clearance	4
	Vessels—	
	Arrival of and discharge of cargo	1
	Change of destination, in Philippine ports	16
	Entry and manifests of cargo to be filed within 24 hours after arrival	2
	Foreign wreckage	335
	Light dues	5
	Light dues, exemption of	6
	Machinery for	328
	No clearance of, to any port in the Philippines not in possession of the United States	4
	Port charges on	5
	Pumps for salvage of	327
	Tonnage of	7
	W.	
	Wagons	223–227
	Walking canes	271
	Watches	215–218
	Wearing apparel	321
	Weights and measures	364
	Whalebone	268–270
	Wharf charges on merchandise	17
	Wheat	239, 240
	Wines	256, 257

		Paragraph.
85	Wood, and manufactures of	181–198
	Wool and other hair, manufactures of	155–167

Y.

Yarns—	
Cotton	125–132
Of two or more materials	329, 330
Of wool and other hair	155–167

Z.

Zinc, and manufactures of	74–79

86 TARIFF CIRCULAR, No. 7. } WAR DEPARTMENT, *Washington, September 8, 1898.*

Where duty has been paid upon merchandize entered at any port in the Philippine Islands in the possession and under the control of the military forces of the United States, and the importer desires to transport said merchandise or any part thereof to any other port or place in the Philippine Islands in the possession and under the control of the military forces of the United States, such merchandise shall be admitted at such port or place without further entry upon identification of the merchandise and presentation of a certificate of the proper officer of the United States showing the payment of the duties thereon at the port of entry.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

TARIFF CIRCULAR, No. 26. } WAR DEPARTMENT, *Washington, December 10, 1898.*

By direction of the President, it is hereby ordered that the existing tariff and regulations governing importations into Cuba, Porto Rico, and the Philippine Islands be, and they are hereby, modified so far as to allow the free entry of packages and articles clearly intended as Christmas presents for the officers and enlisted men of the United States Army and Navy now serving in Cuba, Porto Rico, and the Philippine Islands, and for other employees of this Government in those islands.

Custom officers will take due care that no abuse of this privilege is allowed, and that a reasonable limit shall be placed upon the quantity and value of articles sent to any one address.

All such goods will be transmitted to the proper commanding officers for distribution and delivery.

This order will take effect immediately and will cease to operate after the 7th day of January, 1899, as to Cuba and Porto Rico, and after the 7th day of February, 1899, as to the Philippine Islands.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

87 TARIFF CIRCULAR, No. 50. WAR DEPARTMENT, *Washington, April 14, 1899.*

By direction of the President, the amended Customs Tariffs and Regulations for Porto in Cuba, Porto Rico, and the Philippine Islands are hereby amended by the addition thereto of the following paragraph:

Export duties paid in Cuba, Porto Rico, or the Philippine Islands will be refunded on the return of the merchandise to those islands without having been advanced in value or changed in condition by any process of manufacture while abroad.

This order will be duly proclaimed and enforced in Cuba, Porto Rico, and the Philippine Islands.

G. D. MEIKLEJOHN,
Acting Secretary of War.

TARIFF CIRCULAR, No. 65. WAR DEPARTMENT, *Washington, May 5, 1899.*

The following order of the President is published for the information and guidance of all concerned:

EXECUTIVE MANSION, *May 3, 1899.*

By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States, I hereby order and direct that during the occupancy by the military authorities of the United States of the islands of the Philippine Archipelago and the island of Guam, said islands shall constitute a collection district for customs purposes. Manila shall be the chief port of entry. An officer of the Army shall be assigned to such port, who shall be the collector of customs of the islands and of the chief port, and shall have general jurisdiction over the collection of customs in the islands.

The ports of Iloilo, in the island of Panay, Cebu in the island of Cebu, and San Luis d'Apra in the island of Guam, are hereby declared to be subports of entry with such other subports as may be opened from time to time by order of the Secretary of War, and an officer of the Army shall be assigned to each of the subports as collector of customs, who shall have general jurisdiction of the collection of customs at such subport. He shall make weekly reports to the collector of customs of the islands at the chief port of all collections and transactions over which he has jurisdiction, at the subport, with copies of all entries of merchandise duly certified.

The Secretary of War shall appoint such civilian deputy collectors, inspectors, and other employees as may be found necesary.

The collectors of subports shall deposit all moneys collected by them with the collector of the islands, and a receipt from the collector of the islands shall be taken in duplicate for all such deposits. All moneys collected at the chief port by the collector of customs for the islands, or transmitted to him by collectors at subports, shall be deposited with the treasurer of the islands.

All questions arising in the administration of customs in the islands shall be referred to the collector of the islands for his decision, from which there shall be no appeal except in such cases as may be referred by the collector of the islands to the Secretary of War.

WILLIAM MCKINLEY.

This order will be duly proclaimed and enforced in the islands of the Philippine Archipelago and the island of Guam.

G. D. MEIKLEJOHN,
Acting Secretary of War.

88 TARIFF CIRCULAR, No. 68. WAR DEPARTMENT, *Washington, May 22, 1899.*

By direction of the President, the Amended Customs Tariffs and Regulations for Ports in Cuba, Porto Rico, and the Philippine Islands are hereby amended by the addition thereto of the following paragraph:

No merchandise shall be brought, under penalty of forfeiture thereof, into Cuba, Porto Rico, or the Philippine Islands, from the United States or any foreign country in any vessel measuring less than thirty tons gross, in capacity.

This order will be duly proclaimed and enforced in Cuba, Porto Rico, and the Philippine Islands.

G. D. MEIKLEJOHN,
Assistant Secretary of War.

TARIFF CIRCULAR, No. 81. WAR DEPARTMENT, *Washington, July 8, 1899.*

The following Executive order and the rules for its enforcement are published for the information and guidance of all concerned. The "Customs Tariff and Regulations for the Philippine Islands" are hereby amended accordingly:

EXECUTIVE MANSION,
Washington, D. C., July 3, 1899.

1. Officers of the customs in the Philippine Islands, ceded to the United States by Spain, may issue a certificate of protection entitling the vessel to which it is issued to the protection and flag of the United States on the high seas and in all ports, if the vessel is owned by—

(*a*) A citizen of the United States residing in the Philippine Islands;

(*b*) A native inhabitant of the Philippine Islands, upon taking the oath of allegiance to the United States;

(*c*) A resident of the Philippine Islands before April 11, 1899, hitherto a subject of Spain, upon abjuring his allegiance to the Crown of Spain and taking the oath of allegiance to the United States.

2. The master and the watch officers of a vessel to which a certificate of protection is issued shall be citizens of the United States or shall take the oath of allegiance to the United States, provided that the general commanding the forces of the United States in the Philippines may in his discretion in special cases waive this requirement in whole or in part.

3. Such certificate of protection shall entitle the vessel to the same privileges and subject it to the same disabilities as are prescribed in Article XX of the Consular Regulations of 1896 for American or foreign built vessels transferred abroad to citizens of the United States.

4. The form and manner of the issue of certificates of protection provided for in this order shall be prescribed by the Secretary of War.

WILLIAM MCKINLEY.

REGULATIONS.

1. Officers of the customs in the Philippine Islands who shall be designated for the purpose by the general commanding the forces of the United States in the archipelago may issue certificates of protection to vessels which are not documented by law as vessels of the

89 United States, but are by the law of nations entitled to the protection and flag of the United States.

2. Vessels to which these certificates may be issued are of three classes:

(*a*) A vessel owned by a citizen of the United States residing in the Philippines.

(*b*) A vessel owned by a native inhabitant of the Philippines who shall have taken the oath of allegiance to the United States before applying for such certificate.

(*c*) A vessel owned by a Spaniard resident of the Philippines before April 11, 1899, who shall have abjured his allegiance to the Crown of Spain and shall have taken the oath of allegiance to the United States before applying for such certificate.

3. It has been the practice of Congress in the case of accretions of territory to the United States to provide for the registration as vessels of the United States of vessels owned on the date of the ratification of the treaty by which the territory has been acquired, by subjects, citizens, or residents of the territory acquired, and in the case of the Louisiana purchase, owned by citizens of the United States in the territory at that time. Officers of the customs, accordingly, will carefully distinguish on their books the following classes of vessels in the Philippines entitled to the protection and flag of the United States:

(1) Vessels owned on or before April 11, 1899, by American citizens.

(2) Vessels owned on or before April 11, 1899, by native inhabitants.

(3) Vessels owned on or before April 11, 1899, by Spanish subjects, natives of the Peninsula, resident in the Philippines before that date.

(4) Vessels acquired since April 11, 1899, by American citizens.

(5) Vessels acquired since April 11, 1899, by native inhabitants.

(6) Vessels acquired since April 11, 1899, by Spanish subjects, natives of the Peninsula, resident in the Philippines before that date.

CLASS (a).

4. Vessels of Class (a) will have been acquired by purchase by American citizens.

In such cases before issuing a certificate the officer of the customs shall require satisfactory proof that the applicant is a citizen of the United States. He shall also require the applicant to make oath of his citizenship and of the manner in which it was acquired.

He shall require the applicant to produce the bill of sale, with a copy of the same.

He shall satisfy himself that the sale is made in good faith, and if he is satisfied that the sale is fictitious or is for the purpose of securing the protection and use of the flag of the United States for a vessel owned by one who is not a citizen or does not intend to remain in allegiance to the United States, he shall refuse to grant the certificate.

90 If satisfied of the citizenship of the applicant and of the bona fides of the sale, he shall file the oath of citizenship and the copy of the bill of sale. He shall make record of the original bill of sale in his office, authenticate its execution, and deliver to the purchaser a certificate to that effect, certifying also that the owner is a citizen of the United States. (See form.)

CLASS (b).

5. Vessels of class (b) will be such as were owned by native inhabitants of the Philippines before the islands were ceded to the United States on April 11, 1899, or such as may have been or may be acquired by purchase since that date by such inhabitants.

In both such cases before issuing a certificate the officer of the customs shall require satisfactory proof that the aplicant was a native inhabitant of the Philippines on April 11, 1899, and shall require him to take oath of allegiance to the United States in the presence of witnesses, native inhabitants of the islands.

In the case of a vessel owned by a native inhabitant before April 11, 1899, the officer of the customs shall require the applicant to surrender his former Spanish register or other marine document, if any, with a copy of the same. He shall file the copy, and, if desired, may return to the owner the original, indorser with the statement of the owner's transfer of allegiance.

In the case of a vessel purchased since April 11, 1899, by a native inhabitant, he shall require the applicant to produce the bill of sale, with a copy of the same, and proceed as prescribed in the case of the sale of a vessel to an American citizen, satisfying himself of and certifying to the oath of allegiance, instead of the citizenship of the applicant. (See form.)

CLASS (c).

6. Vessels of Class (c) will be such as were owned by Spanish subjects, natives of the Peninsula, residents of the Philippine Islands before April 11, 1899, who may desire within one year from that date to take the oath of allegiance to the United States, or such as may have been or may be acquired by purchase since that date by such Spanish subjects.

In both such cases before issuing a certificate the officer of the customs shall require satisfactory proof that the applicant was a Spanish subject, native of the Peninsula, and resident of the Philippines before April 11, 1899, and shall require him to take the oath of allegiance to the United States in the presence of witnesses.

In the case of a vessel owned by a Spanish, subject before April 11, 1899, native of the Peninsula, the officer of the customs shall proceed as in the case of a vessel owned by a native inhabitant before April 11, 1899.

In case of vessel purchased since April 11, 1899, by a Spanish subject, he shall require the applicant to produce the bill of sale, with a

91 copy of the same, and proceed as prescribed in the case of the sale of a vessel to an American citizen, satisfying himself of and certifying to the oath of allegiance, instead of the citizenship, of the applicant. (See form).

7. Before issuing the certificate the officer of the customs shall require the gross and net tonnage of the vessel to be ascertained and shall insert the same in the description of the vessel in the certificate. The system of measuring gross and net tonnage in the United States is in most respects similar to that employed by other maritime nations. Officers of the customs may accordingly ascertain usually the particulars required from the foreign registers or other marine documents under which vessels have hitherto been navigating. The General commanding the forces of the United States in the Philippines may on the application of a proper officer of the customs waive this requirement in special cases, especially in the case of small vessels.

8. Before issuing the certificate the officer of the customs shall require the master and the watch officers of the vessel to take the oath of allegiance to the United States.

Evidence that the master or any of the watch officers is a citizen of the United States will be accepted in lieu of such oath on the part of said master or watch officer.

The General commanding the forces of the United States in the Philippines may, in his discretion, in special cases waive this requirement in whole or in part when the public interest shall not be endangered thereby.

Officers of the customs shall, wherever practicable, afford opportunities for the crew of a vessel to which a certificate has been issued to take the oath of allegiance to the United States.

9. Officers of the customs empowered by these regulations to issue certificates are instructed to prepare lists of vessels which have been certified to previously as sold to American citizens in the Philippines since July 1, 1898, and to communicate the substance of these regulations to such American owners. Such owners may be invited to comply with the provisions of these regulations, in order to secure uniformity in the system of record, protection, and use of the American flag for vessels in the Philippines. Where such owners decline to comply, officers of the customs will note the reasons assigned and report the facts, through the usual official channels, to the War Department.

10. The General commanding the forces of the United States in the Philippines is authorized at any time, for sufficient cause, to cancel any certificate issued under these regulations, or any certificate of American ownership heretofore issued by a consul of the United States in the Philippines, and the vessel for which such certificate was issued shall thereupon no longer be entitled to the protection and flag of the United States. He shall report his action in each such case to the War Department.

92 11. The officer of the customs shall not issue a certificate until he is satisfied by inspection that the vessel is engaged in legitimate trade; and any officer of the customs may at any time direct any examination of the owner, master, crew, passengers, cargo, or vessel which may be necessary to satisfy himself that the vessel is in legitimate trade and is entitled to the certificate.

12. The officer of the customs to whom the master of a vessel under the certificate herein provided may apply for a clearance to a foreign port shall advise the master of his duty to report to the consul of the United States at that port, if there be one.

13. Should any vessel to which a certificate is issued desire clearance for the United States, the proper officers of the customs shall advise the owner or master of the provisions of sections 2497, 4219, and 4225 of the Revised Statutes of the United States.

14. Each certificate of protection shall be signed by the general commanding the forces of the United States in the Philippines. It shall also be signed by the officer of the customs issuing it. A copy of such certificate shall be transmitted as soon as practicable by the officer of customs issuing it to the general commanding the forces of the United States in the Philippines, to be filed at headquarters.

As soon as practicable after the close of each month the general commanding the forces of the United States in the Philippines shall transmit to the War Department an abstract of all certificates issued during the preceding month. Such abstract shall recite the following particulars:

(1) Name of vessel.
(2) Rig of vessel, whether steam or sail.
(3) Gross tonnage.
(4) Net tonnage.
(5) Where built.
(6) Year when built.
(7) Name of owner.
(8) Residence of owner.
(9) Description of owner, whether American citizen, native inhabitant, or Spanish subject, native of the Peninsula, and resident of the Philippines on April 11, 1899.
(10) Date of issue of certificate.
(11) Owner of vessel on April 11, 1899, or note that the ownership is unchanged, if the owner on that date is the same as the owner to whom the certificate is granted.
(12) If the ownership has changed, statement whether the owner on April 11, 1899, was an American citizen, or a native inhabitant, or a Spanish subject, native of the Peninsula, and resident of the Philippines on that date.
(13) Name of former owner in case of vessel acquired by purchase.
(14) Residence of former owner.
(15) Nationality of vessel before issue of certificate.

93 FORM.

Certificate No. ------
Port of ------, Philippine Islands.

THE UNITED STATES OF AMERICA.

PHILIPPINE ISLANDS.

SPAIN CEDES TO THE UNITED STATES THE ARCHIPELAGO KNOWN AS THE PHILIPPINE ISLANDS.

Certificate of protection.

In pursuance of Executive order, approved July 3, 1899, by the President of the United States.

------ ------, residing at ------ ------, Philippine Islands, ceded to the
[Name of owner.] [Place of residence.]
United States by Spain on April 11, 1899, having sworn {allegiance to the United / that he is a citizen of the} States / United States} and having sworn that he is the owner of the vessel called the ------ ------, and that said vessel was built in the year 18--, at ----- ----,
[Name of vessel.] [Place of build.]
and that said vessel is a ----- ----- of ----- gross tons and ----- net tons,
[Rig of vessel.]
and that said vessel has ---- decks and ---- masts, and that her length is -----, her breadth -----, and her depth ----, and that said vessel is engaged in legitimate trade.

Therefore, said vessel is by this certificate entitled to the protection and flag of the United States.

Given under my hand at the port of ----- -----, Philippine Islands, this ------ day of ------ ------, in the year one thousand ------ hundred and ------.

[SEAL.]

------ ------, U. S. A.
[Officer of the customs.]

U. S. A.,
General Commanding the Forces of the United States in the Philippine Islands.

94 [Reverse.]

Certificado No------

Puerto de ------, Islas Filipinas.

ESTADOS UNIDOS DE AMERICA,

ISLAS FILIPINAS.

España cede á los Estados Unidos el Archipiélago denominado

ISLAS FILIPINAS.

Certificado de protección.

En cumplimiento de la órden ejecutiva, aprobada el 3 de julio de 1899, por el Presidente de los Estados Unidos.

----- -----, residente en ----- -----, Islas Filipinas, cedidas á los Estados
[Nombre del propietario.] [Lugar de residencia.]

Unidos por España el 11 de abril de 1899, habiendo jurado {lealtad á los Estados / ser ciudadano de los Estados Unidos} y habiendo jurado ser propietario del buque nombrado------
[Nombre del buque.]

y que dicho buque fué construído en año 18--, en---- -----, y que dicho buque
[Lugar de su cons.]

es un ------- -------, de ------- toneladas brutas y ------- toneladas
[Aparejo del buque.]

y que dicho buque fué construído en año 18--, en---- -----, y que dicho buque tiene ------- de eslora, ------- de manga, y ------- de puntal, y que dicho buque se ocupa en legítimo comercio.

Por tanto, dicho buque, por el presente certificado, tiene derecho á la protección y al uso de la bandera de los Estados Unidos.

En testimonio de lo cual expido el presente certificado en el puerto de -----, Islas Filipinas, el día ----- ----- de ----- del año mil ----- -----
[SELLO.]

------ ------, *Ejército de los E. U.*
[Empleado de aduanas.]

Certificate of ownership.

I, ------ ------, officer of the customs for the port of ------ ------, Philippine Islands, designated for the purpose by the general commanding the forces of the United States in the Philippines, do hereby certify that the within bill of sale bearing date the ----- day of -----, 1-----, of the ------ vessel called
[Rig.]

the -----, -----gross tons, ----net tons, sold and transferred by ------ ------ to.....who, {has sworn allegiance to the United States / is a citizen of the United States} has been proved satisfactorily to me to have been duly executed, and I further certify that ------ ------, herein mentioned as the purchaser of said

vessel, {is a citizen of the United States, / is a native inhabitant of the Philippine Islands, and has taken the oath of allegiance to the United States. / on April 11, 1899, was a Spanish subject, native of the Peninsula, resident of the Philippines, and has taken the oath of allegiance to the United States.}

------ ------, U. S. A.
[Officer of the customs.]

Date ------ ------

E. de los E. U.
General en Jefe de las Fuerzas de los Estados Unidos en la Islas Filipinas.

95 [Reverse.]

Certificado de propiedad.

El que suscribe _____ empleado de Aduanas del puerto de _____, Islas Filipinas, nombrado para el caso por el General en Jefe de las fuerzas de los Estados Unidos en las Islas Filipinas, por la presente certifico, que la adjunta cuenta de venta, fechada el _____ de _____ de 1_____, del buque (aparejo) _____ nombrado _____ de _____ toneladas brutas, y _____ toneladas netas, vendido y traspasado por _____, á _____ quien {ha jurado lealtad á los Estados Unidos / es ciudadano de los Estados Unidos} ha justificado satisfactoriamente ante mí que ha sido debidamente extendida, y certifico además que _____ _____, á quien se cita aquí como comprador de dicho buque {es ciudadano de los Estados Unidos. / es natural y residente de las Islas Filipinas y ha jurado lealtad á los Estados Unidos. / con fecha 11 de Abril de 1899, era súbdito español, natural de la Península residente en las Filipinas y ha jurado lealtad á los Estados Unidos.

_____, E. de los E. U.
[Empleado de Aduanas.]

Fecha _____

This order will be duly proclaimed and enforced in the Philippine Islands.

R. A. ALGER,
Secretary of War.

TARIFF CIRCULAR. No. 104.

WAR DEPARTMENT,
Washington, November 6, 1899.

By direction of the President, it is hereby ordered that the existing tariff and regulations governing importations into Cuba, Porto Rico, and the Philippine Islands be, and they are hereby, modified so far as to allow the free entry of packages and articles clearly intended as Christmas presents for the officers and enlisted men of the United States Army and Navy now serving in Cuba, Porto Rico, and the Philippine Islands, and for other employees of this Government in those islands.

Custom officers will take due care that no abuse of this privilege is allowed and that a reasonable limit shall be placed upon the quantity and value of articles sent to any one address.

All such goods will be transmitted to the proper commanding officers for distribution and delivery.

This order will take effect immediately and will cease to operate after the 7th day of January, 1900, as to Cuba and Porto Rico, and after the 7th day of February, 1900, as to the Philippine Islands.

ELIHU ROOT,
Secretary of War.

96 VIII.—*Judgment of the court entered January 23, 1907.*

CONRAD HEINSZEN, ETC.,
vs.
THE UNITED STATES. } No. 22914.

At a Court of Claims held in the city of Washington on the 23rd day of January, 1907, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants, and do order, adjudge, and decree that the claimants, Conrad Heinszen and Gustave Brockman, trading as partners under the firm name of C. Heinszen and Company, do have and recover of and from the United States the sum of sixteen thousand eight hundred and twenty-seven dollars and thirty-one cents ($16,827.31).

BY THE COURT.

97 IX.—*Application for, and allowance of, appeal.*

CONRAD HEINSZEN AND GUSTAV BROCKMAN, trading as partners under the firm name of C. Heinszen & Co.,
vs.
THE UNITED STATES. } No. 22914.

From the judgment rendered in the above-entitled cause on the 23rd day of January, 1907, in favor of claimants, the defendants, by their Attorney-General, on the 23rd day of January, 1907, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed January 23, 1907, in open court.

Ordered: That the above application be allowed as prayed for.

BY THE COURT.

Jan. 23, 1907.

98 Court of Claims.

CONRAD HEINSZEN AND GUSTAV BROCKMAN, trading as partners under the firm name of C. Heinszen & Co.,
vs.
THE UNITED STATES. } No. 22914.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the court overruling the demurrer of the defendants; of the submission of the case by both parties upon

an agreed statement of facts; of the findings of fact and conclusion of law by the court; of the judgment of the court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 24th day of January, A. D. 1907.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 20545. Court of Claims. Term No. 580. The United States, appellant, vs. Conrad Heinszen and Gustav Brockmann, trading as partners under the firm name of C. Heinszen & Co. Filed January 25th, 1907. File No. 20545.

()

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 28 1907
JAMES H. McKENNEY,
CLERK.

No. 580.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,
v.
CONRAD HEINSZEN AND GUSTAV BROCKMANN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO., APPELLEES.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,
v.
CONRAD HEINSZEN AND GUSTAV BROCKMANN trading as partners under the firm name of C. Heinszen & Co., appellees.

No. 580.

MOTION TO ADVANCE.

The United States and the claimants unite in a motion to advance this cause for hearing at the present term, if possible, upon the following grounds:

This is an action for the recovery of customs duties collected by the military government in the Philippine Islands on merchandise shipped by the claimants from the United States to Manila between April 11, 1899, and November 15, 1901. This case is substantially identical upon the facts with the cases of *Lincoln* v. *United States* and *Warner, Barnes & Co.* v. *United States* (197 U. S., 419, and 202 U. S., 484), except that since the mandate of this court was issued in the Warner-Barnes and Lincoln cases an act was passed by

Congress on June 30, 1906, as an amendment to the general deficiency bill, which provides as follows:

> That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed. (34 Stat., 636.)

In its decision upon the reargument of the Lincoln and Warner-Barnes cases, rendered May 28, 1906, this court held that the act of July 1, 1902, which was claimed by the Government to operate as a ratification, did not bear that construction, but applied to duties collected on foreign imports and not on imports from the United States.

There can be no question that this act of June 30, 1906, upon its face ratifies the collection of the duties which are sought to be recovered in this case and other similar cases. In the opinion of the court below, handed down January 7, 1907, the Court of Claims has decided that the ratification

of the collection of these duties is beyond the power of Congress. A copy of that opinion is annexed.

The question involved herein—the power of Congress to ratify the collection of these luties—is of very great public importance, and it is the desire of the Government and the claimants to obtain the decision of this court thereon at as early a date as practicable. There are about three hundred cases pending in the Court of Claims, involving from three to four millions of dollars, which depend upon the decision of the court in this case.

In view of the fact that the question of the power of Congress to ratify the collection of these duties has been before the court at the last two terms in the Lincoln and Warner-Barnes cases, we respectfully suggest the advantage of an early hearing to the court as well as to the parties, and pray that the case be assigned for argument at the present term of the court.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

HENRY M. WARD,
Attorney for Claimants and Appellees.

Court of Claims of the United States.

No. 22914.

Decided January 7, 1907.

CONRAD HEINSZEN AND GUSTAVE BROCKMAN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO., v. THE UNITED STATES.

BARNEY, J., delivered the opinion of the court.

The amended petition in this case, the original of which was filed July 1, 1902, alleges that the claimant shipped merchandise from ports in the United States into the Philippine Islands between April 11, 1899, and November 15, 1901, upon which they paid duties under the customs tariff and regulations promulgated by the Executive order of July 12, 1898, and subsequent amendments. It is alleged that between November 10, 1898, and November 15, 1901, certain army officers were designated under orders of the President to act, and did act, as collectors of customs at the ports of the Philippine Islands, and that upon the arrival at the port of Manila of articles brought by claimant from the United States the said military officers, acting as such collectors of customs and pursuant to and in accordance with said orders and regulations, took possession of such merchandise and placed it under military guard, in the manner prescribed by said regulations, proceeded to assess and levy duties thereon at the rate therein established, and refused to deliver possession of the same to the claimants until the payment in cash of such duties, and threatened, in the event of the default in the payment of such duties, to seize such merchandise with the military force at their command and to sell the same for the payment of such duties; that the claimants were compelled to and did pay to such military officers, acting as such collectors of customs, the amount of duties so assessed by him, but under duress, and in order to obtain possession of their said merchandise and in order to carry on their said business; and upon such payment said merchandise was released to them.

This action is brought to recover from the defendants the amount of the duties so paid by the claimant.

To this petition the defendants demur, and the questions raised by the demurrer are:

(1) Is the Government a proper party defendant? (2) Do the allegations of the petition negative a voluntary payment? (3) Did the validating act of June 30, 1906, legalize the collection of the duties of which the claimant complains? The demurrer of the defendants admits the truth of all the allegations contained in the petition properly pleaded, so that we must look to that pleading alone to determine these questions.

I. As to the first contention of the defendants we shall devote but little attention from the fact that when the *Warner, Barnes & Co.* case was before this court the same point was raised, and while the petition was dismissed by this court on other grounds, the case went to the Supreme Court, and was there considered twice (*Lincoln et al.* v. *United States*, 197 U. S., 419; 202 U. S., 484), and the decision of this court was reversed. While it was urged upon the argument of the demurrer in this case that this point was not considered in the Supreme Court, it hardly seems possible that so important a question should have entirely escaped the attention of the able counsel, as well as the court, in that case.

It appears from the allegations in the petition, and is also a historical fact, that the order of July 12, 1898, was issued by the President as a war measure during the Spanish war, and that the tax thereunder was collected by the military authorities of the United States. It is also alleged that "The several military officers of the United States, acting as collectors of customs as aforesaid, paid over the several amounts of duties so collected by them from your petitioners as aforesaid to the United States, and the whole amount of such duties is now held by the United States." Section 4 of the act of March 8, 1902, provided: "That the duties and taxes collected in the Philippine Archipelago * * * shall be held as a separate fund and paid into the treasury of the Philippine Islands to be used and expended for the government and benefit of said islands:" and, as was said by Judge Wright in his opinion in the *Warner, Barnes & Co.* case, (40 C. Cls. R., 1, 31, 32): "such tariffs were collected solely as a military contribution. * * * The money was not covered into the Treasury of the United States, but was applied by the military government toward its own expenses in prosecuting the war, etc."

In short, this tax was collected by the military authorities of the United States and not by the authorities of the Philippine Islands, and if this collection was illegal we have no doubt the United States are liable for its return, unless they have some good defense thereto.

II. Upon the question of voluntary payment raised by the demurrer of the defendants we might repeat what has already been said upon the first point raised, viz, that a case involving the same question has been before this court before, and twice in the Supreme Court; and while it was not mentioned in the opinions, it is hardly possible that it was entirely unnoticed by either court, or eminent counsel who were engaged on either side.

We deem it, therefore, unnecessary to enter into an extended discussion of the question raised, but will only refer to the case of *Swift* v. *United States* (111 U. S., 22), which appears to us to settle it. The opinion in that case, rendered by Justice Matthews, fully considers the question of voluntary payment under similar circumstances, referring to numerous authorities which we think are clearly applicable to the case at bar, and is ample authority for holding that the allegations in the petition make the payment of the tax in question involuntary.

This case was cited approvingly in *United States* v. *Edmonston* (181 U. S., 500), where it is said: "As indicated in the opinion in *Swift Co.* v. *United States*, there are cases in which the formality of a protest or objection is unnecessary; some things may be taken as equivalent thereto or as sufficient in lieu thereof." (*Ibid.*, 514.)

See Cooley on Taxation, 3d ed., 1505–1506.

Our attention has been called to certain regulations of the revenue department prescribing the manner and form of making protests to assessments of import duties. It is only necessary to say that the tax or imposition complained of in this case was an exaction upon goods which were not imported at all. (*Dooley* v. *United States*, 182 U S., 222, 225.) It can hardly be successfully maintained that the Government can impose an illegal tax and at the same time prescribe the only manner in which objections can be made to its payment.

III. We now come to the most important and difficult question in the case, which is that raised by the contention that the act of June 30, 1906, validated all of the taxes collected by virtue of the order of July 12, 1898, and, of course, the taxes in question paid by the claimant. It is perhaps unnecessary to say in this connection that the decision of the Supreme Court in the insular cases makes the requirement of all duties after April 11, 1899, the date of the ratification of the Spanish treaty, until such duties were provided for by the Congress, contrary to law; hence the question whether the act of June 30, 1906, was curative of this illegality. The deficiency appropriation act of June 30, 1906, contained the following provision:

"That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States or from foreign countries, or exported from said islands are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed." (34 Stats. L., —.)

It must be admitted that this provision is unmistakable in its language and broad enough to completely cover the case if it is possible for Congress so to do.

We fully recognize the rule that a court should never declare a

legislative act unconstitutional, and thereby refuse to obey its mandate, except upon the most careful consideration, and then only where there is hardly room for reasonable doubt. In the present case, however, we do not regard the question as an open one, as the Supreme Court, before the passage of the act in question, declared such a law to be unconstitutional as applicable to the case at bar, and in so doing used the following language, in commenting upon the act of March 24, 1900, chapter 339 (31 Stat. L., 151), and which was invoked by the counsel for the United States as having curative force under like circumstances:

"As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action would be beyond its power. In any event, it should not be interpreted so as to make it retroactive." (*De Lima* v. *Bidwell*, 182 U. S., 199-200.)

In the case of *Dooley* v. *United States* (*supra*) the court held that the right to collect duties on goods brought from the United States into the Philippine Islands under the President's order of July 12, 1898, ceased on the exchange of ratifications of the treaty.

Later, in the case of *Lincoln* v. *United States*, and *Warner, Barnes & Co.* v. *United States* (202 U. S., 484), the court, in speaking of the effect of the ratification act of July 1, 1902, says:

"The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order. If the order, properly construed, did not purport to apply to vessels unless they were either enemy or foreign, then when a vessel ceased to be foreign the order did not apply, and a tax upon such a vessel, not being in accordance with the order, is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (*Hamilton* v. *Dillin*, 21 Wall., 73), still it is not to be presumed to do so on language which, literally taken, has a narrower sense."

Here we have a decision to the effect that Congress, in terms at least, could *easily have ratified* the collection of the duties. But inasmuch as no time is there mentioned when such act, to be effective, could have been passed, and the ruling in the case of *De Lima* v. *Bidwell* is cited approvingly, we again turn to the *De Lima* case, where we find in the paragraph quoted therefrom two things established, (1) that "the right to recover the money sued for could not be taken away by a subsequent act of Congress." Nor could such act deprive a claimant of his right to prosecute a pending suit. (2) That such act should not in any event be interpreted so as to make it retroactive.

Such being the decision of the Supreme Court, we do not regard the question of the constitutionality of the ratifying act of June 30, 1906, an open one, however much we might otherwise incline to apply the act in the present case.

Although we incline to the belief that we are bound by the decisions of the Supreme Court referred to, still in view of the importance of the case as well as our embarrassment at the seeming conflict between the legislative and judicial departments of the Government, we think it not out of place to refer to the ruling in other cases respecting what proceedings or acts may be the subject of ratification.

There are few questions which have been more frequently before courts for determination than those of retrospective and curative statutes relating to taxation, and for that reason such a variety of facts have been presented in these cases that the majority of them give but little light in the decision of the present case.

Most of these cases present the question of the curative force of statutes applicable to the failure to comply with provisions of law relating to the assessment and collection of the tax, but where the tax itself was not fundamentally illegal; others, however, belong to an entirely different class and involve the right of the legislative department to cure an entire want of authority of the tax executive to act at all; in other words, by retrospection to create a tax which was not a tax before. While some of the first class mentioned come very close to the border line of those cases involving the right to collect any tax at all—i. e., the very ground work of the taxation—we believe a clear distinction exists between the two classes which has generally been recognized by the courts and which is fundamental in their decisions.

It is proper also to remark that there is a lack of harmony in some of these cases, and to such an extent as to make it impossible to reconcile many of them; yet we think it can safely be said that the distinction above referred to has been recognized in all of them whenever such distinction was necessary to the decision of the case. The following are a few of the many cases of the first class, i. e., where the statute seeks only to cure some irregularities in the levying and collection of the tax, but where authority for the tax itself existed: or that it was justifiable either in the way of unsatisfied judgments against the municipality, public improvements made according to law, or the like:

Iowa Ry. Co. v. *Loper*, 39 Iowa, 112.
Nottage v. *Portland*, 35 Oreg., 539.
Butler v. *Toledo*, 5 Ohio St., 225.
Dean v. *Borschenius*, 30 Wis., 236.
(See cases cited on p. 514, Cooley on Taxation, and in Black on Constitutional Prohibition, sec. 215.)

There is no conflict of the authorities in this class of cases, and the law is well settled that the legislature by a retrospective statute can cure such irregularities.

Before citing and commenting upon some of the cases where legislatures by retrospective statutes have attempted to cure the levying

and collection of taxes for which there appeared to be no authority whatever, we will call attention to the comment of text writers upon the subject.

Judge Cooley, in his valuable work on Taxation, says:

"One very precise limit to the power to cure these proceedings is this: They can not be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every species of legal proceedings. Curative laws may heal irregularities in action, but they can not cure a want of authority to act at all." (Ibid., 514, 3d ed.)

The same author, in his work on Constitutional Limitations, says: "So he who was never bound either legally or equitably can not have a demand created against him by a mere legislative enactment." (Ibid., 454, 6th ed.) "A retrospective statute curing defects in legal proceedings where they are in the nature of irregularities, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden." Ibid., 456.) "If the thing wanting or which failed to be done, and which constituted the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." (Ibid., 457.) "A curative statute can only be valid when the defect which it seeks to obviate is the lack of some formality which the legislature might have dispensed with in advance, or where the irregularity which is intended to be excused is one which the legislature might in advance have rendered immaterial." (Black on Constitutional Prohibition, sec. 215.)

In the early case of *Fletcher* v. *Peck* (6 Cranch, 87), where one of the questions before the court was the constitutionality of an act of the legislature of Georgia which sought to impair the land title of one of the parties, in delivering the opinion of the court, Chief Justice Marshall (Ibid., 135–136) said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question whether the act for transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection."

In *Bennett* v. *Fisher* (26 Iowa, 497, 501), Chief Justice Dillon, in speaking of retrospective laws, says: "Such exercise of power can only be defended upon principle and sustained in law where they are not directed against the vested rights of particular individuals or classes."

The case of *Hart* v. *Henderson* (17 Mich., 218) involved the constitutionality of a legislative act which was sought to be construed as validating an illegal tax. In declaring the act, with such construction, as unconstitutional, Judge Cooley, in speaking for the court, says: "Curative statutes may cover any mere irregularity in the course of proceeding for the enforcement of a lawful demand; but

they can never cure a want of jurisdiction, either in tax proceedings or those of any other description. Nothing is a tax simply by being called so, for any proceedings by which a man's property is to be taken from him on a claim which has no other basis than the naked declaration of the legislature that it shall constitute a demand against him is unconstitutional and void."

In the case of *Kimball* v. *Rosendale* (42 Wis., 407), this question was discussed by Chief Justice Ryan, and he said: "Perhaps the true limit of the curative power of the legislature, as gathered from all the authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void; defects of execution only, not of authority or jurisdiction; and is confined to defective proceedings under previous legislative authority." (Ibid., 412–413.)

In the case of *Daniels* v. *Watertown* (61 Mich., 514), personal property had been seized and sold by the tax collector under a void assessment, and after suit brought by the owner of the property against the town to recover the proceeds of the sale the legislature passed a curative act validating the assessment. It was held that the rights of the parties became vested prior to such legislation and were not affected thereby.

In *People* v. *Goldtree* (44 Cal., 325), in passing upon the constitutionality of a legislative act enacted for the purpose of curing a defective assessment of taxes, the court says: "It is impossible to draw a well-defined line between the classes of defects which may and those which may not be remedied by curative legislation, nor are the authorities on the subject reconcilable." And, further, "We think it can safely be laid down as a rule in these matters that whenever the officer had no power or jurisdiction to do the act in question, and not that in its performance he did not pursue the law in respect to time, mode, or some other particular, the act is void, and subsequent legislation can not cure the defect."

The counsel for the defendant has cited *Grim* v. *Weissenberg* (57 Pa. St., 433) as sustaining their contention that the act in question is effectively curative. That was a case arising during the late civil war where a tax for raising a bounty for volunteers was levied without any authority of law. This tax was subsequently ratified by the legislature, and this curative statute was held valid for that purpose. How much the necessities of war may have influenced this decision it is unnecessary to inquire, and it is sufficient to say that Judge Cooley in his work on taxation refers to this case in a note and speaks of another case immediately following it as "a more doubtful one." (Cooley on Taxation, 515, note 1, 3d ed.) The same criticism might be made of the case of *Kunkle* v. *Franklin* (13 Minn., 127), where a similar war tax was illegally imposed and subsequently ratified by the legislature, and where doubt as to the soundness of the doctrine is expressed in the opinion itself, for the court in holding the curative statute valid says: "Although this question is not free from doubt and embarrassment, we think it must be answered in the affirmative. It is true, as said by Mr. Chancellor Kent, that a retrospective statute

affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."

The case of *Hamilton* v. *Dillon* (21 Wall., 92) is also relied upon by the counsel for the defendant. With reference to that case it is sufficient to say (1) the tax was held legal without any validating act, and (2) the tax was also a proper exercise of the military power of the President against an enemy in time of war.

Any number of cases might be further cited where this question is discussed and decided; and in nearly all of them the same rule is kept in view and maintained, i. e., that retrospective statutes relating to defects in tax proceedings are valid only to the extent of curing such defects as are in the nature of irregularities, and can not extend to matters of jurisdiction. We believe there are but few cases where this rule has not been followed; and in those cases the decisions are based upon exceptional circumstances which bring them near to the border line before mentioned.

If a tax can be imposed and collected under an Executive order without any authority whatever of the Congress, where the sole authority for taxation under the Constitution rests, and such illegal act can be afterwards validated by Congress to the extent of refusing redress to parties who have paid this tax under duress, it would seem that there was no limit to retroactive legislation by Congress except such as are provided in express terms by the Constitution.

If the claimants had refused to submit to the imposition of the tax in question, and had taken their merchandise into the Philippine Islands clandestinely, thus evading its payment, it would not be claimed that they could be convicted of the crime of smuggling; indeed, it would not be contended that any duty could be recovered of them by virtue of said validating act of Congress. This being so, we are confronted in this case with the anomaly of the claim that the Congress by said act has imposed a burden upon those who have peacefully submitted to the imposition of an illegal tax, trusting to the courts for redress, which might have been successfully avoided by a disregard and contempt of the military authorities of the Government. A mere statement of this claim appears so shocking to every sense of justice and idea of good citizenship as to need no argument to show its unsoundness.

It is unnecessary to say that at the time the Executive order in question was issued its provisions were well within the war power of the President, and that all taxes received under it were collected only during such times as it was deemed a proper exercise of such power. The different views which were entertained upon that subject were set at rest, however, by the decision of the Supreme Court in *Lincoln* v. *United States* (*supra*), and which has given rise to the present litigation.

The demurrer is overruled, with leave to the defendants to further plead as they may be advised at any time within sixty days.

O

FILE COPY.

Office Supreme Court, U. S.
FILED.
APR 6 1907
JAMES H. McKENNEY,
Clerk.

No. 580.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,

v.

CONRAD HEINSZEN AND GUSTAV BROCKMAN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.
JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.
GEORGE M. ANDERSON,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,
v.
CONRAD HEINSZEN AND GUSTAV BROCKMAN, trading as partners under the firm name of C. Heinszen & Co. } No. 580.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This suit was brought in the Court of Claims on July 1, 1902, by the appellees, subjects of the Emperor of Germany, to recover certain import duties, aggregating the sum of $16,827.31, collected under the Presidential order of July 12, 1898, and subsequent amendments, by the officer of the United States Army then acting as collector of customs at the port of Manila. The duties were paid on goods manufactured in the United States and imported into the Philippine Islands between April 11, 1899, and November 15, 1901.

28236—07——1

This is an important class case, the decision of which involves the validity of the collection of duties amounting to several millions of dollars.

The duties in question were collected by the collector of customs and paid over to the treasurer of the Philippine Islands in the ordinary and usual course of business, without either objection or protest on the part of importer or consignee. The duties so collected were used for the maintenance and support of the government of the Philippine Islands.

On August 23, 1906, the defendants filed a demurrer to the claimants' petition, which was overruled by the Court of Claims in an opinion dated January 7, 1907, with leave to the defendants to further plead within sixty days.

On January 22, 1907, the defendants filed a general traverse to the claimants' petition, and on the same day the case was submitted to the Court of Claims upon an agreed statement of facts prepared by the attorneys for the claimants and the defendants.

On January 23, 1907, the Court of Claims rendered a judgment in favor of the claimants in the sum of $16,827.31—

ASSIGNMENT OF ERRORS.

The Court of Claims erred—

First. In not holding that the duties in question were voluntarily paid to the collector of customs.

Second. In not holding that the validating act of June 30, 1906 (34 Stats., 636), operated to legalize, ratify, and confirm the collection of said duties.

Third. In not dismissing the claimants' petition.

AMERICAN CONTROL OF THE PHILIPPINE ISLANDS.

I.

Tariff Orders of the President Prior to the Ratification of the Treaty of Paris.

Following the destruction of the Spanish fleet by Admiral Dewey in Manila Bay and the occupation of the naval station at Cavite, the President, on May 19, 1898, addressed a communication to the Secretary of War, in which he stated that the time had arrived for the military occupation of the Philippine Islands. In this letter he stated that he had appointed Maj. Gen. Wesley Merritt to the command of the military forces in the islands, and directed him upon arrival at Manila to publish a proclamation outlining the policy for the control of the conquered territory.

On the same day the President addressed a communication to the Secretary of the Treasury, stating that he intended to open all ports and places in the Philippines in the actual possession "of our land and naval forces by conquest" to the commerce of all neutral nations "as well as our own." He was directed to examine the existing Spanish laws in relation to duties and taxes, and make such recommendations as he deemed proper with respect either to the rates of duties and taxes or to the regulations which should be adopted for their imposition and collection. The President stated that during the military occupation of the islands the collections would be made "under the orders of the Secretary of War and the Secretary of the Navy, by the military or naval commanders, as the case may be, of the

ports or places which may be in the possession of our forces. Your report is desired in order that I may be able to give the proper directions to the Department of War and of the Navy." (Messages and Papers of the Presidents, vol. 10, pp. 208–212.)

On July 13, 1898, the Executive order of July 12, 1898 (R., 22), was published at Washington, D. C., by the Secretary of War, and attached to the order, under the same cover, was a pamphlet entitled "Customs Tariff and Regulations for the Philippine Islands." This order did not reach Manila until some time in September, 1898.

When the pamphlet containing the Presidential order of July 12, 1898, and the "Customs Tariff and Regulations" reached Manila, the schedule of tariff duties was found to be unsuited to the business conditions existing at that place, and upon the receipt of petitions and requests from merchants and business men of Manila asking for modifications, a board of officers was appointed by the military governor on September 24, 1898, to consider modifications of the duties on certain classes of goods.

On September 29, 1898, the military governor postponed the operation of the tariff until November 10th, and this suspension was afterwards confirmed by an executive order issued by the Secretary of War on October 13th.

On October 3, 1898, an expert on revenue matters was ordered by the War Department to report to the

collector of customs at Manila for special service. "He was directed to make a careful study of the trade conditions of this port and of the United States customs tariff and regulations, with a view of recommending such modifications as would put them in the best practicable shape for promulgation." The expert, under the direction and with the assistance of the collector of customs, prepared and submitted his report on October 24, 1898, which was practically a literal copy of the Spanish regulations that went into force under the royal decree of January 7, 1891. His report having been approved, it was printed in pamphlet form and issued as "Customs Tariff and Regulations in the Philippine Islands," to take effect November 10, 1898.

The tariff schedule of the Customs Tariff and Regulations, as put in force on November 10, 1898, imposed a lower rate of duties than the tariff act of July 24, 1897 (30 Stats., 151), commonly known as the "Dingley Act." (Ann. Rep. Maj. Gen. Commanding the Army, 1899, part 2, pp. 313 and 314, and Rec., p. 29.)

The provisions of the customs tariff and regulations were amended by orders of the President of April 10, 1899 (Rec., 31), and May 3, 1899 (Rec., 74). These orders contained directions to the military officers, acting as collectors of customs, as to the manner in which the business at the ports should be conducted.

II.

Government of Philippine Islands following the ratification of the treaty of Paris.

Following the ratification of the treaty of peace between Spain and the United States, on April 11, 1899, the military government remained in force in the Philippine Islands until the letter of instructions of President McKinley, dated April 7, 1900, to the Secretary of War. In this letter the President outlined his policy for the establishment of a civil government in the Philippines. In accordance with the intention expressed therein he appointed five commissioners, designating Honorable William H. Taft as president of the board, "to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities, subject in all respects to any laws which Congress may hereafter enact." The acts of the Commission were to be subject to the approval and control of the Secretary of War, to whom its reports should be made. The Commission was given general authority to legislate and establish a complete system of civil government for the islands. The instructions directed that whenever, in the opinion of the Commission, the condition of affairs in the islands justified, report should be made to the Secretary of War, and the central administration would be transferred from military to civil control. The instructions provided for the transfer of the legislative power from the military government to the Commission, to take effect September 1, 1900, under such rules and regulations as

the Secretary of War should prescribe. Under this legislative power, the Commission was given authority to make "rules and orders, having the effect of law, for the raising of revenue by taxes, customs, duties, and imports; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military government is now competent to provide by rules or orders of a legislative character."

Under the power and authority granted by the letter of instructions of the President of April 7, 1900, the Commission passed a large number of acts relating to the internal affairs of the Philippine Islands, embracing a great variety of subjects and dealing extensively with the finances of the insular government. Those acts have been collected in six large volumes under the title of "Public Laws Enacted by the Philippine Commission."

The transition from a military to a civil government, under the Philippine Commission, was authorized by Congress in the Spooner amendment to the army appropriation bill, approved March 2, 1901 (2 Supp., 1509), which provided, among other things, that—

> All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired

> from Spain by the treaties concluded at Paris on the 10th day of December, 1898, and at Washington on the 7th day of November, 1900, shall, until otherwise provided by Congress, be vested in such person and persons, and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion.

The President, in pursuance of the authority contained in the Spooner amendment, issued an order June 21, 1901, to take effect July 4, 1901, appointing Hon. William H. Taft civil governor, transferring the civil authority from the military governor to the civil governor, and authorizing the Philippine Commission to exercise executive control under and in conformity to the letter of instructions of April 7, 1900.

On September 17, 1901, a tariff act was passed by the Philippine Commission (Pub. Laws Phil. Com., p. 581) and put in force by its terms November 15, 1901. It was entitled "An act to revise and amend the tariff laws of the Philippine Archipelago," the first section of which reads as follows:

> SEC. 1. The provisions of General Order No. 49, office of the United States military governor in the Philippine Islands, dated October 23, 1899, relating to the customs duties on imports and exports of the Philippine Islands, and tonnage duties and wharf charges therein, and the several orders supplementary thereto

and amendatory thereof, are herewith amended to read as follows:

General Order, No. 49, referred to therein, was an order of the military governor promulgating the tariff duties imposed by the Presidential order of July 12, 1898, as amended and revised down to September 1, 1899.

On March 8, 1902, the Congress passed an act (32 Stats., 54), entitled "An act temporarily to provide revenue for the Philippine Islands, and for other purposes," section 1 of which provides—

> that the provisions of an act entitled "An act to revise and amend the tariff laws of the Philippine Archipelago," enacted by the United States Philippine Commission on the 17th day of September, 1901, shall be and remain in full force and effect, and there shall be levied and collected and paid upon all articles coming into the Philippine Archipelago from the United States the rates of duty which are required by the said act to be levied, collected, and paid upon like articles imported from foreign countries into said archipelago.

On July 1, 1902, Congress passed an act (32 Stats., p. 691, sec. 1) entitled "An act temporarily to provide for the administration of the affairs of the civil government in the Philippine Islands, and for other purposes," in which, by section 1, it approved, ratified, and confirmed the acts of the President and the Philippine Commission under the President's instructions of April 7, 1900, the Executive order of June 21, 1901, and the act creating the several departments of

the Philippine government enacted by the Philippine Commission September 6, 1901. By section 2 of the act of July 1 (supra) the acts of the President in promulgating the order of July 12, 1898, and the amendments thereto, and the acts of the authorities of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments, were approved, ratified, and confirmed.

THE DUTIES IN QUESTION WERE PAID VOLUNTARILY TO THE COLLECTOR OF CUSTOMS.

I.

No Protest.

Assuming that the ratification act of 1906 is unconstitutional, which we do not admit, there still can be no recovery in this case. The duties in question were voluntarily paid to the collector of customs, and, under a long and unbroken line of State and Federal decisions, there can be no recovery. It is a time-honored maxim, handed down from remote generations, that "Ignorance of the law excuses no man." And upon this maxim is founded one of the fundamental principles of the common law, that "Money paid in mistake of law can not be recovered." As was tersely said by Lord Ellenborough in *Bilbie* v. *Lumley*, 2 East., 472, "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might be carried." (For an elaborate re-

view of the English authorities see *Clark* v. *Dutcher*, 9 Cowen, N. Y., 674.)

The rule is clearly stated by Judge Cooley as follows:

> Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he can not afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. (Cooley on Taxation, vol. 2, p. 1498.)

The law as to what constitutes an involuntary payment, and the elements necessary to establish such a payment, is clearly stated in the case of *De la Cuesta* v. *Insurance Company*, 136 Pa. State, 78, 79, wherein the court, speaking through Mr. Justice Paxson, said:

> There is no principle of law better settled than that money voluntarily paid with a knowledge of the facts can not be recovered back. It is unnecessary, in referring to a settled rule of law, always to state the reasons of the rule in a judicial opinion. It is sufficient to say here that I know of no legal principle which is sustained by better reasons of public policy. If in every instance in which a man is in doubt as to which is the safe course to

pursue he can pay under protest and then sue to recover it back, it is difficult to see where litigation is to end. The law therefore wisely holds that a voluntary payment can not be recovered back. In the recent case of *Harvey* v. *Girard N. Bank*, 119 Pa., 212, the law is thus stated: "A voluntary payment of money under a claim of right can not in general be recovered back. There must be compulsion, actual, present, and potential, in inducing the payment by force of process available for instant seizure of person or property, when the party so paying must give notice of the illegality of the demand and of his involuntary payment. The element of coercion being essential, a mere protest or notice will not change the character of the payment or confer of itself a right of recovery;" citing *Peebles* v. *Pittsburgh*, 101 Pa., 304. In *Harvey* v. *The Bank* there was a loss of credit, a very serious matter to a business man, by permitting a draft to go to protest. The party paid to protect his commercial honor, but we said it was not duress. In *Neely's App.*, 124 Pa., 406, there was an attempt to set aside an antenuptial contract on the ground of duress. After the marriage day had been fixed, the guests invited, and the caterer engaged, the husband produced an antenuptial contract which he required his intended wife to sign. She protested by her tears; his reply was, "No contract, no wedding." We held there was no duress. Many other cases of a like nature could be cited were it necessary.

Those above mentioned are referred to as showing that mere embarrassment or loss of credit, as in the bank case, or mortification, as in the *Neely* case, do not amount to the kind of duress which the law recognizes as justifying a payment under protest. And just here it is proper to remark that the only effect of a protest, in a case in which it may be legitimately applied, is to show that the payment was not voluntarily made, and that the party protesting intends to claim it back.

The rule thus announced, that in the ordinary course of business money paid in mistake of law can not be recovered back, applies with especial force where the payment has been for taxes. Payments made for that purpose, although the taxes were illegally collected under a void statute and paid under compulsion, are still voluntary, unless the rights of the parties paying have been preserved by protest. This rule of law proceeds upon the theory that it is against public policy to allow taxes which have been paid into the treasury of a State, without notice of an intention to sue for their recovery, to be refunded. Such notice should be given to the collector as would put him upon his guard and prevent him from settling his accounts with the State without taking into consideration the possibility of a suit for the recovery of taxes illegally paid. The reasons for the requirement of protest have been clearly stated in the opinion of this court in the case of *Nichols and*

Company v. *The United States* (7 Wall., 128), where the court said:

> The prompt collection of the revenue and its faithful application is one of the most vital duties of government. Depending as the Government does on its revenue to meet not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the Treasury should be able to make a reliable estimate of means in order to meet liabilities. It would be difficult to do this if the receipts from duties and internal taxes paid into the Treasury were liable to be taken out of it on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell in advance how much money would be required to pay the judgments obtained on them, and the result would be that the Treasury estimates for any current year would be unreliable.

This court has uniformly held that some kind of notification to the collector at the time of payment is necessary in order to entitle the taxpayer to recover taxes illegally paid. In the leading case of *Elliott* v. *Swartwout* (10 Pet., 137) this court laid down the common-law rule of protest with great clearness, and that rule has been followed ever since, not only by the Federal but by the State courts.

(*Bend* v. *Hoyt*, 13 Pet., 262; *Swartwout* v. *Gihon*, 3 How., 110; *Lawrence* v. *Caswell*, 13 How., 488; *Nichols & Company* v. *United States*, 7 Wall., 128 (decided after the passage of the customs act of February 26, 1845, requiring written protest); *Erskine* v. *Van Arsdale*, 15 Wall., 77; *De Lima* v. *Bidwell*, 182 U. S., 1; *United States* v. *New York and Cuba Mail S. S. Co.*, 200 U. S., 488; *Chesebrough* v. *United States*, 192 U. S., 260; *Newhall* v. *Jordan*, 149 Fed. Rep., 586; *Smith* v. *Schroeder*, 15 Minn., 35; *Galveston Company* v. *Gorham*, 49 Tex., 279; *Cauvin & Duprez* v. *Mayor et al.*, 3 Baxter, 453; *Jenks* v. *Lima Township*, 17 Ind., 328; *Mays* v. *Cincinnati*, 1 Ohio, 276.)

II.

Protest a Condition Precedent to the Right of Recovery.

There is no allegation or finding of fact in this case to show involuntary payment. It is incumbent upon the appellees to establish this fact as a condition precedent to the right of recovery. In the case of *McMillan* v. *Richards* (9 Cal., 365–421), where money was erroneously paid to redeem lands sold at sheriff sale, the court said:

> The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation.

This case was cited with approval in *Bucknall* v. *Storey* (46 Cal., 595), and that case in turn was

affirmed in the case of *De Baker* v. *Carillo* (52 Cal., 473).

The case of *Hamilton* v. *Dillon* (21 Wall., 73), in its essential features, bears a striking resemblance to the case at bar. In that case, during the civil war, the President, under authority of a provision of the act of July 13, 1861, which empowered him to license and permit commercial intercourse between the citizens of loyal States and the inhabitants of insurrectionary States, issued an Executive order, dated March 31, 1863, licensing and permitting such commercial intercourse between the citizens of loyal States and the inhabitants of insurrectionary States. In carrying out the license the permit required each licensee to pay a fee or tax of four cents per pound on cotton, although the act did not provide for the imposition of this tax or fee. The court in its opinion (p. 91) said:

> The position in which the plaintiffs put themselves, therefore, was an entirely voluntary one. They have no right now to say: "It is true we purchased the cotton under a license which required us to pay a certain bonus; but having purchased it, we were entitled to repudiate the condition, although we had no right to make the purchase except by virtue of the license." Much less have they now a right to say, after having complied with the conditions without murmur or objection, that the bonus was extorted from them by compulsion.

If any doubt should exist that this court always has considered, and still considers, a notification that would amount to a protest, necessary in all cases in which suit is brought for the recovery of illegal duties, that misapprehension should be removed by the language used by the court in the case of *Chesebrough* v. *United States* (192 U. S. at p. 260):

> There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Ellioit* v. *Swartwout*, 10 Pet., 137, and *Bend* v. *Hoyt*, 13 Pet., 266, which are customs cases, the payments were made to release goods held for duties on imports, and the protest became necessary in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia* v. *Collector*, 5 Wall., 730, and *Collector* v. *Hubbard*, 12 Wall., 13, which were internal-revenue tax cases, the actions were sustained "upon the grounds that the several provisions in the internal-revenue acts referred to warranted the conclusion as a necessary implica-

tion that Congress intended to give the taxpayer such remedy." It is so expressly stated in the last case, page 14. As the case of *Erskine* v. *Van Arsdale*, 15 Wall., 75, followed these and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part as it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand.

III.

Statutory Duress.

It is contended, however, by the appellees in this case that they were compelled to pay the duties under what may be termed statutory duress. It is insisted that the tariff rules and regulations placed such a restraint upon the appellees in the importation of their goods into the Philippines as to render the payment of the duties thereon involuntary. (R. 33, secs. 1 and 3.) For the purpose of establishing duress, the appellees are anxious and willing to take advantage of those provisions of the Customs Tariff and Regulations which provided for placing a military guard upon the vessel, but insist that the provisions of paragraph 10 (R. 37) of the regulations requiring the filing of protest before payment, as a condition precedent to the right of recovery, shall be ignored. In other words, *they wish to affirm the regulations for one purpose and repudiate them for another.* We think it may be stated as a correct proposition of

law that any general provision of law that applies to all property alike, to protect the Government in the collection of its revenues, and to prevent property from being removed out of the jurisdiction of the officers of the Government, until the taxes are paid, no matter how stringent it may be, or what restrictions it may place about the taxpayer and his property, can not alone constitute duress.

In the case at bar the duties were collected at the port of Manila under the Executive order of July 12, 1898, and subsequent amendments. Unless the collection of these duties has been legalized and ratified by the ratification act of 1906, they must be deemed to have been collected illegally. Assuming this to be the fact, it is still contended that there is no right of recovery.

The articles upon which the duties were collected were never in the possession of the United States. While it is true that a military guard went on board every vessel upon its arrival, the sole and only purpose of this procedure was to prevent the cargo, or any part of it, from being smuggled ashore to escape payment of the prescribed duties. The duties were paid in the usual and ordinary course of business, without coercion or threats, and without protest or objection of any kind from importer or consignee, and the course pursued in their collection was identical with that followed in the collection of similar duties, under the customs administrative act, at ports in the United States.

While perfectly cognizant of all the facts, neither the collector of customs nor the importer seemed to have been aware of any defects in the authority under which the duties were collected. They were collected by the customs officers and paid by the importers in the regular and usual course of business. There was no urgent necessity for immediate payment. Under the Customs Tariff and Regulations, the officer in command of the United States forces could not have seized the goods until the expiration of ninety days after their arrival in port. (R. 37, sec. 14.) During that period the goods were neither actually nor constructively in the possession of the United States. The only duty to be performed by the collector of curtoms and his subordinate officers was to prevent the discharge of the cargo until the duties were paid. The appellees were entitled, under the regulations, to ninety days within which to pay the duties, and upon presentation of good and sufficient reasons, to the officer in command of the United States forces, to an extension of three months. (R. 35, Tariff Circular No 9.)

From the surrender of Manila down to the present time, all statutes and orders, under which import duties have been collected at Philippine ports, have provided that in cases of objection to their payment, as illegal, no duties would be refunded unless paid under protest. Even prior to the American occupation, the laws under which the Spanish tariff was collected provided for protest in cases of objection to the payment

of the duties, and until November 10, 1898, when the Executive order of July 12, 1898, went into effect, duties were collected at the Philippine ports under the Spanish law, and subject to all protests therein provided. Articles 54, 199, 200, 202, 210, and App. 4, Par. 4, Royal Decree of July 7, 1891, and Customs Rules and Regulations effective April 1, 1891.

The Customs Tariff and Regulations annexed to the Executive order of July 12, 1898, continued the provisions of the Spanish tariff and provided (R. 37, sec. 10)—

> "that any objections to the assessment of duty must be filed by the importer before payment by him of the same, and no refund of duty will be made thereafter."

The tariff act of the Philippine Commission, passed September 17, 1901, to become effective November 15, 1901, embodied the Presidential order of July 12, 1898, and its annexed customs tariff and regulations, thereby providing for protest.

The administrative customs act, passed by the Philippine Commission February 6, 1902, followed very closely our customs administrative act, and provided for protest, in writing, setting forth definitely and specifically the reasons of objection.

The case of *Newhall* v. *Jordan, Collector* (149 Fed. Rep., 586), was for the recovery of duties paid in New York upon bay rum imported from Porto Rico, upon which no tax was authorized by statute. The parties stipulated "that the plaintiff could not obtain the

bay rum so imported by him except by paying duties." Judge Thomas, in the opinion, said:

> It is true that his property was detained, but the detention was on the theory that it was subject to the payment of the tax. Had there been no detention, and there had been payment, with or without protest, or acts or words equivalent thereto, the payment would have been voluntary. (*Chesebrough* v. *United States, supra*, 259.) But when property arriving in the country passes through the various channels that are necessary to the determination of the question of its taxation, and the importer himself pursues the law and does, without dissent or suggestion of oppression or duress, whatever is necessary to procure his goods, he makes his own interpretation of the law. And if he interpret it mistakenly there seems to be no rule that allows him at one time to affirm its application by his action—an affirmance unmodified by word or deed—and thereafter disaffirm the subjection of his merchandise to the statute, it is a payment under mistake of law, for which no relief exists.

The rule thus announced by the circuit court is a mere affirmance of what has been frequently held by this court. In the case of *Hamilton* v. *Dillin*, *supra*, it is said:

> Whether, therefore, the President and Secretary of the Treasury did or did not rightly judge as to their powers under the act, the plaintiffs evidently agreed with them, and voluntarily applied for permission to engage in the trade on the conditions imposed and

voluntarily paid the bonus which is now sought to be recovered back. The case does not come within any class of cases on which the plaintiffs rely to take it out of the rule as to voluntary payments. In our judgment, therefore, the defense in this case might have rested on this ground alone.

IV.

Legal Status of Collectors at Philippine Ports.

The Philippine Islands, immediately upon the ratification of the treaty of Paris, became domestic territory of the United States. It may be conceded that neither the military nor civil government established by the President could, after the ratification of the treaty, in the absence of express authority from Congress, legally impose duties on goods shipped into the Philippine Islands from the United States. The power to lay tariff duties rests primarily in Congress and can be exercised by the Executive or a Territorial government only upon the express authority of Congress. (*Dorr* v. *The United States*, 195 U. S., 138.)

This court, in its second opinion in the case of *Warner, Barnes & Co.* v. *United States* (202 U. S., 484), at page 499, held that the President had authority, after the final ratification of the treaty of peace with Spain, on April 11, 1899, to collect customs duties on imports from foreign countries into the Philippines under existing laws. The "existing laws" were evidently the customs administrative act of 1890 and the tariff act of July 24, 1897, commonly known as the "Dingley Act."

It is therefore clear that the collectors of customs at the ports in the Philippine Islands occupied exactly the same legal status with regard to unauthorized collections as the collectors of customs at the different ports in the United States. Hence, everything that has been decided concerning illegal collections at ports in the United States on imports from Porto Rico or the Philippine Islands, is equally applicable to collections made at ports in the Philippine Islands upon imports from the United States.

In the case of *De Lima* v. *Bidwell, supra,* this court held that the customs administrative act of 1890, in so far as it provided for an appeal from the decision of the collector, only applied to cases arising out of the collection of duties upon goods imported from a foreign country. It was held that the customs administrative act did not apply to goods imported into the United States from Porto Rico after the ratification of the treaty of Paris. The court, in the *De Lima* case, however, held that although a protest in writing, as required by the customs administrative act, was unnecessary, as a condition precedent to the right of recovery of duties illegally collected upon merchandise shipped into the United States from Porto Rico *still protest was necessary,* and clearly indicated that that protest must consist of three elements: First, an objection against the classification of the articles as "foreign;" second, a protest against the payment of the duties over by the collector; third, a notification to the collector of an intention to sue for the recovery of the duties.

The conditions existing at the port of New York, as set out in the *De Lima* case, were identical with the conditions existing at the port of Manila, so far as concerns the collection of duties upon the goods in question. In both cases the goods were imported from domestic territory into domestic territory; at both ports the Dingley law was applicable and could have been legally enforced. The collectors at the port of Manila were legally qualified officers for the collection of duties upon foreign goods, and so were the collectors at the port of New York. The mere fact that the rates paid on foreign goods, at Manila, under the Executive order, were less than could have been imposed under the Dingley law, is immaterial. Hence, the conditions being the same at both ports, it is difficult to understand why involuntary payment should be essential to the right of recovery in New York and not essential at Manila.

In the case of *Dewell et al.* v. *Mix* (116 Fed. Rep., 664) the learned judge rendered an opinion in which he presents a very lucid and masterly analysis of that part of the opinion of this court in the *De Lima* case relating to the effect of protest upon the payment of import duties. He said:

> The *De Lima* case (182 U. S., 1) disposes of nearly every question involved. In fact, it would have settled the entire controversy in the plaintiffs' favor absolutely if a written protest had been filed, and quite possibly if an actual verbal protest had been made, setting forth in either case that the goods in question were not imported merchandise, forbidding

the paying over of the moneys, and giving notice of an intention to recover by suit if necessary. It can make no difference whether the plaintiffs have, by their conduct, become estopped from setting up that the goods are domestic, or whether they are unable to maintain their suit because they paid as they did to an agent, who disposed of the moneys in the regular course of business before any notice not to do so had been given him. In the *De Lima* case (p. 179) the court says: "It is true that to prevent the seizure of the sugars the plaintiffs did enter them as imported merchandise, but any admission derived from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course."

In the entire discussion of *Elliott* v. *Swartwout* (10 Pet., 137–154), to be found in the *De Lima* case on pages 177–180, the Supreme Court seems to assume that the objection, protest, and notice in the *Elliott* v. *Swartwout* case are necessary conditions precedent to a common-law recovery, and the conclusion appears to be inevitable that without such action no recovery could have been had in either case. I am quite familiar with the reasoning of the court in the *Fassett* case (142 U. S., 486), and also with the manner in which that reasoning was treated in the *De Lima* case.

In the case of *Flint Eddy and American Trading Co.* v. *Bidwell* (123 Fed. Rep., 200) the Circuit Court held that an action for the recovery of duties can not be maintained where the duties have been paid without

objection or protest, and affirmed the decision in the case of *Dewell et al.* v. *Mix, supra.*

V.

Error of Court of Claims.

The Court of Claims, in its opinion in this case overruling the demurrer filed by the United States, disposes of this whole question in four brief paragraphs. (R. 14—II.)

In the case of *Warner, Barnes & Co.* v. *United States* (197 U. S., 419; 202 U. S., 484), referred to in the opinion of the Court of Claims, the failure of the claimants to enter protest against the payment of the duties was not presented to the Court of Claims at the hearing of the case nor considered by the court in its opinion; nor was there anything in the record transmitted by the Court of Claims to this court to indicate whether protest had or had not been made.

At the first hearing of the *Warner-Barnes* case in this court the failure of the claimants to enter protest upon the payment of the duties was not referred to in the argument of the case nor mentioned in the opinion of the court.

Upon the rehearing of the case by this court argument was strictly limited to the question of ratification. While the failure of the appellants to protest was referred to by the Attorney-General in his argument upon the rehearing, an examination of the language used by him (p. 495) shows beyond question that the absence of protest was referred to in his dis-

cussion of the opinion in the case of *De Lima* v. *Bidwell* only as bearing upon the question of ratification.

It will not do to say that because the question of voluntary payment might have been considered by the court in the *Warner-Barnes* case it will be deemed to have been considered and that the Government is thereby estopped from raising that question in this case. If appellees were entitled in this case to invoke the doctrine of *res adjudicata*, that rule would be true. If the doctrine of *res adjudicata* could be invoked, the appellees would be entitled under that doctrine to a ruling by this court that all questions that might have been considered in the former case shall be deemed to have been considered, and therefore barred from consideration in the present case. But, unfortunately for appellees, the doctrine of *res adjudicata* can not be invoked in this case. The two fundamental elements underlying *res adjudicata*, which would warrant the application of that doctrine to this case, are absent, namely, the same parties and the same cause of action. Here we have entirely different parties and an entirely different cause of action from those in the *Warner-Barnes* case.

The appellees can not invoke the doctrine of *stare decisis* upon rules that apply to the doctrine of *res adjudicata*. In other words, the court will not consider the opinions in the *Warner-Barnes* case as decisive of the question of voluntary payment raised in this case, simply upon the ground that voluntary payment might have been presented and considered

by the court in the *Warner-Barnes* case. The doctrine of *stare decisis* is the doctrine of precedents. The matter must have been presented in the former case and fully disposed of in the opinion. In other words, the court will not consider as a precedent something that *might* have been presented and considered in the previous case.

The Court of Claims, in its reference to the case of *Swift Co.* v. *United States* (111 U. S., 22), clearly indicates that it did not thoroughly comprehend the exact points decided by this court.

The case of *Swift Co.* has no application whatever to the question of protest involved in the case at bar. In that case there was an express contract. The company, which was engaged in the manufacture of matches, furnished its own dies for the stamps used by it and was entitled to a commission of ten per cent on the price of the stamps. The Treasury Department would not pay the commission in anything but stamps, which the company accepted for a long period, and which were worth to it only ninety cents to the dollar. There was no mistake of law and there was no mistake of fact in this case in the payment of the commission in stamps.

It was in consequence of an arbitrary ruling of the Internal Revenue Bureau that *Swift Co.* was paid less than it was entitled to receive. The case was decided upon the ground that the Commissioner had deliberately adopted an unalterable course of dealing which he had made known

to those interested, and it was well known that business could be transacted in no other way. The court said: "A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced," and this, the court held, upon the authority of the case of *United States* v. *Lee* (106 U. S., 196), dispensed with the necessity for protest.

This court, in the case of *Swift Co.*, upon the authority of *Ogden* v. *Maxwell* (3 Blatchf., 319), said that "It was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

This language was used by the court in a general discussion of voluntary and involuntary payments, and was not material to the grounds upon which the case was decided.

The case of *Ogden* v. *Maxwell* does not involve the same principle as the case at bar, nor was it held, as stated in the opinion of this court in the case of *Swift Co.*, that protest was not necessary. In that case the collector of customs was entitled to charge a fee of twenty cents for every permit to land goods, and these fees were paid for the use of the collector. The collector, instead of issuing a permit to each passenger to land his personal baggage and tools of trade, issued one permit for the whole vessel,

but demanded and received the pay of one permit for every five passengers. What the court did hold was that, as it was not required by statute, no *written protest* was necessary, which raises the inevitable inference that a verbal protest was necessary.

In the *Swift Co.* case, in addition to the fact that there was an express contract, there was also a running account of practically continuous transactions between the Government and the company, and the commissions for the printing of the stamps were paid by the Government to the company. It would be just as reasonable to hold that in a running account between a merchant and a customer, where an account had been rendered by the merchant allowing certain credits, which were, in fact, incorrect, a protest by the customer, where he had paid the bill, was necessary in order to entitle him to recover what was due him on the account stated.

In the case at bar each collection was a separate and distinct transaction, and after its completion the account was closed, and the vessel, after discharging its cargo, sailed away to some other port, from which it might return with another cargo, or it might discharge its cargo at some other port, or it might return with an entirely different class of goods.

The Court of Claims also acquired an erroneous conception of the relation which the case of *The United States* v. *Edmonston* (181 U. S., 500) bears to the *Swift Co.* case.

The *Edmonston* case, while it reaffirms the *Swift Co.* case, also explains more in detail why a protest was

not necessary upon each payment for the stamps. It does not, however, by any means create the impression that protest, even in this class of cases, is not necessary, but only that protest having once been made it is not necessary to repeat the protest at every successive transaction.

This court in the case of *The United States* v. *New York and Cuba Mail S. S. Co.* (200 U. S., 488), clearly drew the distinction between the purchase of internal-revenue stamps in the case of *Swift Co.*, where there was a succession of purchases that amounted to an almost continuous transaction, and those cases where each payment formed a distinct and separate transaction. At page 494 the court said:

> There is no such imminence in the duress charged by defendant in error. It purchased the stamps of a dealer at various times. No information was given to the collector of internal revenue of the particular purpose nor claim that the law was unconstitutional. There was no claim of the collector of the port from whom the clearances were asked that defendant in error was acting under the restraint of the law and yielding only to enable his ships to depart to their destinations. All determining conditions, therefore, are the same as in the *Chesebrough case.*

VI.

Appellees Have no Equities.

It may therefore be stated as a well-settled rule of law, independent of any statutory provisions, that

there can be no recovery of illegal duties unless paid under compulsion and with protest at the time of payment.

However, aside from the well-settled rule of law in this class of cases, there existed another strong and equitable reason for the requirement of protest—the very order under which the duties in the case at bar were collected was finally prepared in response to representations of the importers themselves, who should, in fairness, have given some notice of an objection to a tariff which, in part at least, was the result of their own counsel.

All the duties collected in the ports of the Philippines during the time covered by the transactions in question, were used to support the government there for the protection of life and property. Had the United States at any time withdrawn from the Philippines, a condition of anarchy would have prevailed, and there would have been little or no protection to these and similar claimants in conducting their affairs. In fact, their business would have been sacrificed. From an equitable standpoint, the claimants in this class of cases do not occupy an enviable position. After having joined in the preparation of a schedule of tariff duties to be imposed and collected for the support and maintenance of a local government which would afford protection to their business interests, and after having acquiesced in the collection of the duties voluntarily, they are here, unsupported by any rule or principle of equity known to the law.

28236—07——3

THE COLLECTION OF THE DUTIES IN QUESTION WAS VALIDATED BY THE ACT OF JUNE 30, 1906 (34 STATS., 636).

I.

Establishment of Territorial Government in the Philippines.

The sequence of events in the Philippine Islands, from the destruction of the Spanish fleet by Admiral Dewey up to the first enactment by Congress of legislation for the government of the islands, shows that from the very moment of their acquisition by the United States, a territorial government was established in those islands, more complete and comprehensive in its scope than was ever established, in the first instance, in any territory previously acquired by the United States, except where Congress created the territory by an organic act. The government was so perfect in all of its details that the military régime shaded off, almost imperceptibly, into a civil form of government, which in its entirety was adopted by Congress.

It is important to consider the conditions that confronted the President upon the cession of the Philippine Islands to the United States on April 11, 1899. Congress was not in session. The President was compelled to at once assume control over a semibarbarous, heterogeneous people, scattered over a large number of different islands, who had very little conception of civilized government; a people speaking different languages; at war with each other and in insurrection against the United States. The authority

of the President to establish government and maintain peace and order in the islands was an authority, as Mr. Justice Brown said in the *De Lima-Bidwell case*, "not necessarily arising from the Territorial clauses of the Constitution, but from the necessities of the case and from the inability of the States to act upon the subject." The learned justice was there discussing the clause of the Constitution which vests in Congress the power to make rules and regulations for the government of the Territories.

We think it will be accepted as a correct interpretation of the law, that the power vested in Congress by the Constitution for the control of newly acquired territory, rests in the Executive, acting through the military arm of the Government, upon the failure of Congress to exercise such power. It was impossible for the President to establish a local government in the Philippine Islands under the conditions then existing. It was likewise impossible for the same reason to establish an internal-revenue system by which taxes could be imposed upon the property of the inhabitants and revenue raised for the support of the government. Some other plan had to be adopted; some other remedy had to be devised, and the most feasible plan was to establish, under military government, a revenue system such as the President did establish. The Customs Tariff and Regulations constituted the agency through which the revenues were raised for the support of a Territorial government in the Philippine Islands. The military government thus established

was continued by the President until after the issuance of his letter of April 7, 1900, when he outlined a plan for the establishment of a civil form of government in the islands. Congress seems to have accepted and concurred in the action of the President in thus governing the islands.

No legislation was enacted by Congress relative to the government of the Philippines Islands until the act of March 2, 1901, known as the "Spooner amendment," which vested all military, civil, and judicial powers necessary to govern the islands in such person or persons as the President might designate, to be exercised in such manner as the President might direct. The authority of Congress to delegate this power to the President has been sustained by this court in the *Dorr case*. (195 no. 138) The Spooner amendment not only continued in force the government already established by the President, but vested in him almost unlimited authority to establish any kind of government that he might deem proper for the islands.

The Spooner amendment was followed by the act of Congress of March 8, 1902, which ratified and confirmed the tariff act of the Philippine Commission of the 17th of September, 1901, which imposed duties upon articles imported into the Philippine Archipelago from the United States, as well as from foreign countries.

This was followed by the act of July 1, 1902, in the first section of which Congress approved, ratified, and confirmed the acts of the President and the Philippine Commission as established under the President's

instructions of April 7, 1900, and the Executive order of June 21, 1901. Section 2 of the act approved, ratified, and confirmed the acts of the President in promulgating the order of July 12, 1898, known as the "Tariff Rules and Regulations," and the collection of duties thereunder.

In the case of *Warner, Barnes and Company* v. *The United States* (197 U. S., 419, and 202 U. S., 484) it was held by this court that the second section of the act of July 1, 1902, did not ratify the collection of duties on goods imported into the Philippine Islands from the United States between the date of the ratification of the treaty and the act of Congress of March 8, 1902. It will be observed, however, that every step taken by the President, every act performed by both military officers and civil authorities under his direction, with the exception of the collection of the duties above referred to, had been approved, ratified, and confirmed by Congress, and had therefore become a part of the established territorial form of government of the Philippine Islands. In other words, with the act of July 1, 1902, nothing was left undone by Congress to legalize the entire system of government theretofore established, except the ratification of the collection of duties on goods imported into the Philippines from the United States during the period between the ratification of the treaty and the act of March 8, 1902. That Congress considered it had ratified the collection of these duties by the act of July 1, 1902, is apparent from the fact that almost immediately following the second decision of this

court in the *Warner-Barnes case* the act of June 30, 1906, was passed, which is as follows:

> That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed.

It is with the constitutionality of this act, legalizing the collection of all tariff duties paid on goods shipped into or from Philippine ports prior to March 8, 1902, that we are now concerned.

II.

Territories Under Exclusive Control of Congress.

The Territories are governed by Congress almost entirely independent of any limitations contained in the Constitution. Congress has power either to govern Territories directly, or to establish such government therein as it deems proper, or to delegate its power to establish such government.

That Congress had power to delegate to the President authority to make all rules and regulations

necessary for the establishment of a civil government in the Philippine Islands, was held by this court in the *Dorr case*. There is no limitation as to the kind of government it may establish in the Territories. In other words, it may establish one kind of government in the Philippines, another in Porto Rico, and still another in Arizona. The government of the Northwest Territory was delegated by Congress to a governor and three judges, with authority to pass needful laws (1 Stat. L., 51). A similar provision was made for the government of the Territory of Louisiana (2 Stat. L., 283). In these Territories the acts of the governor and three judges were afterwards ratified and confirmed by Congress. A similar course has been pursued in organizing governments in other Territories of the United States. In the case of *American Insurance Company* v. *Canter* (1 Pet., 511) a judgment, passing title to 156 bales of cotton, rendered by a court in the Territory of Florida, consisting of a notary public and five jurors, was held valid by this Court. In the case of the *National Bank* v. *The County of Yankton* (101 U. S., 129) it was held that Congress

> has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people under the Constituion of the United States may do for the States.

III.

The Act does not Interfere with Vested Rights.

Claimants in the court below attached great importance to the fact that this suit had been instituted prior to the passage of the act of June 30, 1906. It was contended that inasmuch as a suit was pending at the time of the passage of this act, there existed such a vested right in the appellants as could not be divested by an act of Congress.

The mere bringing of a suit does not create a vested right. It is only the assertion of a right. The right, if any exists in this case, accrued when the duties were collected, and that is the only right the claimants can now assert. Their rights have not been increased or diminished by the institution of this suit. The Court of Claims, in its opinion, has fallen into the error of holding that an implied promise to return an illegal tax bestows upon the taxpayer a vested interest in its return. The mistake the Court of Claims made was in assuming that Congress has no power to divest a vested right. It is unnecessary for us to go to that extent in this case, for the reason that no rights have here vested. However, the authorities that we shall cite, both State and Federal, are unanimous in holding that the legislative branch of the Government may divest vested rights after the institution of suit as completely as before.

It is contended that this court in the case of *De Lima* v. *Bidwell* held that where suit had been instituted to recover an illegal tax such a right had

vested as could not be taken away by an act of Congress. We do not think that the opinion in the *De Lima case* will admit of such construction. This court in the second *Warner-Barnes decision*, at page 498, said:

> The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order.

After using this clear and unmistakable language, the court said that since Congress had passed the act of July 1, 1902, after the decision of the *De Lima case*, that in view of the "grave doubt at least" cast upon the power "to ratify taxes under circumstances like the present," if Congress had intended to encounter the limitations of that case, it would have done so in unambiguous language from which there could be no escape. The language used in the *De Lima case*, which is referred to as casting grave doubt upon the power of Congress to ratify a tax under the circumstances (pp. 199 and 200), is not applicable to the questions involved in the case at bar. The statute there in question was merely an appropriation act, the retroactive effect of which was extremely doubtful, and the payment of the duties had been duly protested. *In the case at bar there was no protest whatever.* In fact, this court used language in the same opinion which clearly indicates that it has no application to the case at bar, when it said:

> Perhaps we may go further and say, that so far as these duties were paid voluntarily

> and without protest, the legality of payment was intended to be recognized; but it clearly can not have any retroactive effect as to moneys theretofore paid under protest in which action to recover back had already been brought.

The meaning intended to be conveyed in the *Warner, Barnes case* was that Congress, as a body unlearned in the refinements of the law, might very naturally, in view of the language used in the case of *De Lima* v. *Bidwell* and its apparent purpose, have hesitated to pass an act depriving the plaintiffs, who had already brought suits, of the right to continue those suits to judgment, and that if any other construction could be placed upon the act it was the duty of the court to do so. The language used in the *Warner, Barnes case*, however, distinctly removed the *grave doubt* which this court thought might have caused Congress to hesitate in meeting the limitations of the *De Lima case.*

It was contended by counsel for appellees in the court below that the act of June 30, 1906, was passed for the purpose of ratifying the collection of duties in the Philippines after April 11, 1899, *for which suits had not already been instituted.* The language of the statute will bear no such interpretation. It was passed as an act supplementary to and interpretative of the act of July 1, 1902, and this is shown beyond a reasonable doubt by the proceedings in Congress immediately before the passage of the act in question.

On June 28, 1906, there was a debate in Congress upon the bill, which appears on page 9769 of

the Congressional Record (59th Cong., 1st sess., vol. 40) in the identical language in which it was enacted. To this bill an amendment was offered by Senator Morgan, prepared by the attorneys representing the different claimants, which is as follows:

> *Provided*, That this act shall not apply to suits pending in the Court of Claims on the 28th day of May, 1906, for the recovery of duties paid in the Philippines on imports from and exports to the United States, and imports from Spain from and including April 11, 1899, to November 15, 1901. (Id., 9770.)

This amendment, it is needless to say, never became a law.

There was also spread upon the Congressional Record a brief by the attorneys for the claimants, setting forth, among other things, the language relied upon in the case of *De Lima* v. *Bidwell*, and the opinions of the Supreme Court in the case of *Warner, Barnes & Co.*, both upon the original hearing and the reargument of the case. (Id., 9770–9774.) It is therefore clear that Congress, in passing the act of June 30,1906, intended to meet squarely the limitations of the case of *De Lima* v. *Bidwell*, and intended, beyond a doubt, to ratify all collections of duties in the Philippines after April 11, 1899, whether suits had been instituted for their recovery or not.

IV.

The Act is not in Conflict with the Revenue Clauses of the Constitution.

The act of Congress under consideration is not affected by the revenue clauses of the Constitution. In the case of *Downes* v. *Bidwell* (182 U. S., 244) this court, in passing upon the constitutionality of the Foraker Act (31 Stats. L., 77), held that customs duties collected at the port of New York on goods imported from Porto Rico were legally collected. The court in referring to sections 8 and 9, article 1, of the Constitution, as applying to imports from territories of the United States, said:

> We are therefore of the opinion that the island of Porto Rico is a territory appertaining and belonging to the United States, but not a part of the United States, within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff can not recover back the duties exacted in this case.

In the second *Dooley case* (183 U. S., 151), construing the same act, the court held that article 1, section 9, of the Constitution applied only to articles exported from the States of the Union to foreign countries, and not to articles exported from a State to a Territory of the United States. It was there held that articles shipped from New York to Porto Rico are, in view of the fact that the duties were to

be applied to the maintenance of the government of Porto Rico by the act, collections upon imports and not upon exports.

V.

The Obligation of Contracts not Impaired.

The right to recover an illegal tax is not strictly a right depending upon contract. At least, not such a contract as would come properly within section 10, article 1, of the Constitution, which declares that no State shall make any law impairing the obligation of contracts. It will be observed that this is a limitation upon the States and not a limitation upon any general power of Congress. It is unnecessary, however, to enter into any discussion as to the power of Congress to pass a law impairing the obligation of contracts. The implied promise to refund an illegal tax (if a promise can be implied) is not such a contract as comes within the limitations of the Constitution. The contracts protected by the Constitution are such as have been deliberately entered into by the parties and "assent to be bound is of the very essence of the obligation protected by the Constitution," and has no application to "obligations imposed by the law without the assent of the party bound." (Amer. & Eng. Encyc. of Law, vol. 15, 2d ed., 1032, and cases cited.) Nor is Congress necessarily limited by this clause in its enactment of legislation, because the practical effect may be to incidentally impair or annul contracts. (Ib., p. 1045.)

VI.

Power of Congress to Ratify.

This is not an attempt to lay a tax which Congress now thinks ought to have been imposed six or seven years ago, but to ratify and legalize a tax collected then upon authority which all parties interested, taxpayer and tax collector alike, thought at that time to be legal. Our contention, briefly stated, is that if Congress, on April 11, 1899, could legally have imposed the duties in question in this case, it can now ratify and legalize the collection of those duties.

In the second opinion in the *Warner-Barnes case* this court said that "undoubtedly the order of July 12, 1898, contemplated vessels from America as well as others," and, while considering it unnecessary to construe the order, said:

> The ratification may be assumed to apply to the order as actually made and not to have been limited to such an order or so much of this order as the President had a right to make. But it does not construe the order, and as it confines the ratification to actions in accordance with the order and amendments, the question, What actions were in accordance with them is for us. The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order.

Further on the court, in its opinion, stated that the President had authority, after the final ratification of the treaty of peace with Spain, to collect customs

duties on imports from foreign countries into the Philippine Islands under existing laws, and that because the act of July 1, 1902, was not necessary to ratify collections prior to April 11, 1899, it was not for that reason without meaning, as it set at rest any question concerning the validity of the collection of duties on foreign imports into the Philippine Islands under the order of July 12, 1898. In other words, it ratified the authority of the President to collect duties for a less amount than was provided for by existing laws, if any ratification should be necessary.

Mr. Justice White, in his dissenting opinion in the *Warner-Barnes case* (concurred in by Mr. Justice McKenna), not only held that Congress *had the power* to ratify the collection of duties under the order of July 12, 1898, after the conclusion of peace, but that Congress actually *had so ratified them*. This opinion, considered in connection with the language used by the majority of the court, leads to the irresistible conclusion that this court was agreed upon the power of Congress to ratify.

VII.

Authorities in Support of the Above Propositions.

It has been generally held in the States that retroactive laws may be enacted where they are not *ex post facto* and do not interfere with vested rights to the extent of impairing the obligation of contracts.

In the case of *Grim* v. *Weissenberg School District* (57 Pa. St., 433) the power of the legislature to subsequently ratify a tax, levied without authority of

law, for raising a bounty for volunteers during the civil war was in question. Judge Sharswood, delivering the opinion of the court, said:

> The argument for the unconstitutionality of this act is placed on this ground: That at the time of its passage the claimant had a vested right to recover back from the township the money which he had been compelled to pay without authority of law; and this vested right the legislature could not divest. If an act of assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights. There is no clause, either in the Constitution of the United States or of this Commonwealth, which prohibits retrospective laws. * * *
>
> The power of taxation is a necessary and indispensable incident of government. It also has limits, but they are broadly marked and well defined, e. g., an act of the legislature authorizing contributions to be levied for a mere private purpose, etc. Within this limit the power of the legislature to impose taxes or to authorize their imposition by subordinate municipal authorities is of necessity discretionary. To permit its wisdom, policy, or even the equality to be questioned judicially would be to stop the wheels of government. * * *
>
> The taxation impeached in the case before us was clearly within the limit thus prescribed. It was for a public purpose and to subserve an end eminently advantageous to the community upon which it was levied. It has not been pretended, and could not be, that the

> legislature had not the power antecedent to authorize it. If so, they could cure any irregularity or want of authority in levying it by a retroactive law, even though thereby a right of action which had been vested in an individual should be divested. It is within the principles of all the decisions of admitted authority. If the legislature can cure an irregularity in a judgment or other legal proceedings * * * by retroactive laws, thereby destroying legal claims or defenses, or practically transferring legal vested titles, *a fortiori* may they make valid the acts of public officers in the *bona fide* performance of public duties, such as that of levying and collecting taxes imposed for an admitted public good and whose justice and equality are not impugned. The familiar maxim applies in such a case: *Omnis ratihabitio retrotrahitur et mandato priori equiparatur.* Nor is there any greater force in the argument which has been strongly urged upon us that the plaintiff, having commenced this action before the passage of the confirming act, had thereby acquired a right to his costs of suit, of which he can not now be deprived. There is no vested right to costs in any case of which a party can not be divested by the legislature.

The same principle of law is stated briefly and clearly in "Cooley on Taxation" (vol. 2, p. 1493):

> A property owner who has paid an illegal assessment has, in his action to recover back payment, no vested right which legislation

> can not take away, nor is there any implied agreement to return the assessment if wrongfully collected which would invalidate such legislation as imparing the obligation of the contract.

In Iowa it is held that where a tax had been levied without authority of law and a subsequent act of the legislature legalizing the levy and collection of the tax was enacted, such act was constitutional. (*Iowa R. R. and Land Co.* v. *Soper*, 39 Iowa, 112; *Boardman* v. *Beckwith*, 18 Iowa, 292.)

In a suit for the recovery of taxes paid in Oregon under an invalid assessment for street improvements, it was held that a subsequent act legalizing the levy and collection of the taxes was constitutional. (*Nottage* v. *City of Portland*, 35 Oregon, 539.)

In the case of *Hardeman* v. *Downer* (39 Ga., 425), where a homestead act exempting certain property from execution affected the lien of a judgment creditor, the court said (p. 436):

> It is contended, however, in this case, that the rights of these parties are fixed by the judgment and that the homestead law divests a vested right, and is therefore void. It is well settled that it is no violation of the Constitution of the United States for a State to pass a law divesting a vested right, provided that right is not vested by the contract of the parties. (*Satterlee* v. *Mathewson*, 2 Peters, 380; *Watson* v. *Mercer*, 8 Peters, 88; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420; *Baltimore & Susquehanna R. R. Co.* v. *Nesbit*,

10 How., 395; *Carpenter* v. *Pennsylvania*, 17 How., 456.)

In Maryland a statute declared void all bonds, contracts, and assurances whatsoever, upon which a usurious rate of interest was charged. A subsequent act provided that in cases of usurious contracts, only the excess over the legal rate of interest should be forfeited. It was held that this exercise of the legislative power relating to preexisting usurious contracts was constitutional. (*Wilson* v. *Hardesty*, 1 Md. Ch. Dec., 656.)

In Ohio an act of the legislature taxing a bank which at the time of its organization was exempted from taxation by law, was held constitutional. (*Sandusky City Bank* v. *Wilbor*, 7 Ohio, 481.) The opinion in this case cites the case of *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 539, where Chief Justice Taney said:

> It is well settled by the decisions of this court that a State law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States, unless it also impairs the validity of a contract.

The court also cites with approval the case of *Satterlee* v. *Mathewson* (3 Peters, 413) and *Watson et al.* v. *Mercer* (8 Peters, 110).

In New York, where a mortgagor under a subsequent statute was deprived of his right of redemption, the court held "that the power of the legisla-

ture to interfere with vested rights is unlimited, save by the restrictions contained in the Federal and State constitutions." (*Butler* v. *Palmer*, 1 Hills. N. Y., 324.)

Wait, in his work on "Actions and Defenses" (vol. 4, p. 506), upon the authority of *Hyde* v. *City of New Orleans* (11 La. Ann., 191), summarizes the law giving authority to legalize taxes where suit has been brought:

> Although the tax was illegal when paid, yet if before a final judgment in an action to recover it back the tax is legalized a recovery can not be had.

It has been held by this court in a number of cases that acts of a State legislature or Congress which affect procedure in courts where actions are in process of litigation, or even after judgment, are constitutional.

In the case of *Calder* v. *Bull* (3 Dall., 386), where a probate court in Connecticut by decree refused to record a will, thereby vesting the property of the decedent in certain heirs, the legislature enacted a law setting aside the decree and granting a new trial with the right of appeal. In the new trial the will was recorded. This court in passing upon the validity of the statute said:

> The effect of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing in the case by the same court of pro-

> bate that passed the decree against the will of Norman Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but in virtue of a subsequent resolution or law and the new hearing thereof and the decision in consequence, the right to recover certain property was divested and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is whether this resolution or law of Connecticut, having such operation, is an *ex post facto* law within the prohibition of the Federal Constitution.

This court held that the law did not fall within the technical definition of an *ex post facto* law and did not impair the obligation of a contract, and by unanimous decision sustained the judgment of the Supreme Court of Errors of Connecticut.

In the case of the *Baltimore and Susquehanna R. R. Co.* v. *Nesbit et al.* (10 How., 395–401), the court said:

> If it were necessary to sustain by precedent the authority or practice of the State legislature in awarding a new trial, or in ordering a proceeding in the nature of an appeal, after litigation actually commenced, or even after judgment, and as to which provision for new trial or appeal had not been previously made, a very striking example from this court might be adduced in the case of *Calder and Wife* v. *Bull and Wife*, decided as long since as 1798, and reported in the 3d of Dallas, page 386.

The case of *Satterlee* v. *Matthewson* (2 Peters, 378) strongly supports the position taken by the appellants in this case, that legislatures may pass retroactive acts divesting vested rights, and goes further even than the case of *Calder* v. *Bull*, in that it absolutely and unequivocally deprived one of the parties to a suit of his right of action. In that case Satterlee and Matthewson held lands in the State of Pennsylvania as tenants in common under a Connecticut title. The lands were afterwards divided between them, and Satterlee became the tenant of Matthewson under a lease to be terminated on a year's notice. Satterlee afterwards secured a Pennsylvania title to the land leased from Matthewson, and upon trial in a suit for ejectment, brought by Matthewson, the court of common pleas of Bradford County, Pa., held that Satterlee, having held the land as tenant of Matthewson, could not set up a title against his landlord.

The case was taken to the Supreme Court of Pennsylvania upon a writ of error in 1825, and it was held that "The relation between landlord and tenant could not exist between persons holding under a Connecticut title." On April 8, 1826, the legislature of Pennsylvania enacted a statute declaring that "The relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the Commonwealth." The case came up for hearing a second

time before the Supreme Court of Pennsylvania, which held that the act of assembly of April 8, 1826, was constitutional and affirmed the judgment of the court of common pleas of Bradford County in favor of Matthewson. Satterlee then brought the case on writ of error to the Supreme Court of the United States, claiming that the act of April 8, 1826, was unconstitutional. This court held that—

> There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions.
>
> There is no part of the Constitution of the United States which applies to a State law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract,

and the court in its opinion said:

> The objection, however, which was most pressed upon the court and relied upon by the counsel for the plaintiff in error was that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this or of any Circuit Court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract; and it has been shown that the act in question has no such effect upon either of the contracts which have been before mentioned.

Another case in point, that of *Watson* v. *Mercer* (8 Peters, 88), arose out of the following state of facts: Mercer and his wife executed a deed conveying certain land belonging to the wife to a third party, who reconveyed the same to the husband. The acknowledgment of the deed from Mercer and wife to the third party was defective under the laws of Pennsylvania. After the death of the wife, her heirs recovered the land in a suit of ejectment from Mercer. Subsequently an act was passed by the legislature of Pennsylvania curing defective acknowledgments, and under said act the heirs of the husband recovered the land in a suit of ejectment from the heirs of the wife. The question of the validity of the act was decided in favor of its constitutionality by the Supreme Court of Pennsylvania. The case came to this court upon a writ of error.

Mr. Justice Story, delivering the opinion of the court, said:

> As to the first point, it is clear that this court has no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the State from passing retrospective law, generally; but only *ex post facto* laws. Now, it has been solemnly settled by this court, that the phrase *ex post facto* laws is not applicable to civil laws, but

> to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings, which affect private rights retrospectively. The cases of *Calder* v. *Bull* (3 Dall., 386), *Fletcher* v. *Peck* (5 Cranch, 138), *Ogden* v. *Saunders* (12 Wheat., 266), and *Satterlee* v. *Matthewson* (2 Pet., 380) fully recognize this doctrine.

In the case of *Hamilton* v. *Dillin* (supra) the President, without express authority from Congress, imposed a fee of four cents a pound on cotton imported from disloyal into loyal States during the civil war. What was known as the nonintercourse act of July 13, 1861 (12 Stat., 257), contained a provision that the President might, in his discretion, license and permit intercourse between the citizens of loyal States and the inhabitants of insurrectionary States, the intercourse "to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

In pursuance of this provision the President issued an Executive order licensing and permitting such intercourse "to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury," and accompanying this order were certain rules and regulations of the Secretary of the Treasury, approved by the President, one of which provided that "for each permit to purchase cotton in any insurrectionary district and to trans-

port the same to a loyal State, per pound * * * four cents."

The appellant brought suit on assumpsit in the court below against Dillin, the surveyor of the port at Nashville, Tenn., to recover fees paid by him from August, 1863, to July, 1864. Congress afterwards passed a ratifying act, July 2, 1864 (13 Stat., 375), in which it legalized

> fees collected under the rules and regulations made by the Secretary of the Treasury and approved by the President, dated, respectively, the 28th of August, 1862, 31st of March, 11th of September, 1863, or under any amendments or modifications thereof which have been or shall be made by the Secretary of the Treasury and approved by the President, for conducting commercial intercourse which has been or shall be licensed and permitted by the President with and in States declared in insurrection.

The court said:

> We are also of opinion that the act of July 2, 1864, recognized and confirmed the regulations in question.

It was upon the authority of the case of *Hamilton* v. *Dillin* that this court intimated, in the case of *Warner, Barnes & Co.* (supra), that Congress could deprive plaintiffs of their vested rights in process of being asserted if the power to do so was in language which could not be construed to have a narrower sense.

In *Comanche County* v. *Lewis* (33 U. S., 198), where bonds were issued by a county in Kansas fraudulently organized, the bonds were declared legal under a subsequent act of the legislature reorganizing the county. The court said:

> The ample power delegated by the constitution to the legislature enabled it not only to organize a county in the manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor had been.

The court further said:

> Nor is this ruling peculiar to the jurisdiction of Kansas. It is universally affirmed that when a legislature has full power to create corporations, its acts recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what before was only a *de facto* corporation. It is true that there must be a *de facto* organization upon which this recognition may act, as was held in *State ex rel. Atty. Gen.* v. *Ford County*, 12 Kansas, 441, 446; and in this case it appears from the findings, as well as from the testimony, that there was such *de facto* organization. There being this *de facto* organization, there was ample recognition by the legislature.

In the case of *Street* v. *United States* (133 U. S., 299), in which ratification was unnecessary, the court went out of its way to affirm in clear and forci-

ble language the decision in the case of *Comanche County* v. *Lewis:*

> But we are not limited to this. Full power of legislation in the matter of increase and reduction of the Army is with Congress. It prescribed in this act the proceedings by which that reduction was to be accomplished. In pursuance of that act certain proceedings were had. The power which can direct what proceedings shall be had can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority. (*Comanche County* v. *Lewis, ante*, 198.)

In *Mattingly* v. *The District of Columbia* (96 U. S., 687) the power of Congress to legislate retrospectively in relation to matters of taxation in the District of Columbia was upheld. In the opinion the court said:

> There were also acts of the legislative assembly of the District which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority,

according to the maxim, *Omnis ratihabitio retro trahitur et mandato priori æquiparatur.* Under the Constitution, Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. (*Cohen* v. *Virginia*, 6 Wheat., 264.) Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.

In *National Bank* v. *County of Yankton, supra*, the power of Congress to legislate in relation to the Territories is clearly stated in the opinion of the court as follows:

> In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

In the case of *Utter* v. *Franklin* (172 U. S., 416) certain bonds issued by Pima County, Ariz., in aid of railroads were declared by this court to be invalid (*Lewis v. Pima County*, 155 U. S., 154). Congress subsequently gave to the legislature of Arizona authority to validate the issue of said bonds, which was done. Thereafter, as doubt still existed in some quarters as to their validity, Congress passed another act ratifying the action of the legislature, and the validity of the last act of Congress was considered in this case. The Court said:

> We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the Territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a State legislature has over its municipal corporations. (*American Ins. Co.* v. *Canter*, 1 Pet., 511; *National Bank* v. *Yankton County*, 101 U. S., 129.)
>
> Curative statutes of this kind are by no means unknown in Federal legislation. Thus, in *National Bank* v. *Yankton County*, *supra*, this court sustained an act of Congress nullifying a legislative act of the Territory of Dakota authorizing the issue of railway bonds, but validating action theretofore taken by the

county voting subscription to a certain railroad company, holding it to be "equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute." In *Thompson* v. *Perrine*, 103 U. S., 806, we also sustained a similar act of the State of New York ratifying and confirming the action of commissioners in issuing similar bonds. In *Read* v. *Plattsmouth*, 107 U. S., 568, a similar ruling was made with regard to an act of the legislature of Nebraska validating an issue of bonds by the city of Plattsmouth for the purpose of raising money to construct a high school building. See also *New Orleans* v. *Clark*, 95 U. S., 644; *Grenada County* v. *Brogden*, 112 U. S., 261; *Otoe County* v. *Baldwin*, 111 U. S., 1; 1 Dillon, Municipal Corporations, p. 544; Cooley's Const. Lim., 6th ed., 456; *Belles* v. *Brimfield*, 120 U. S., 759; *Anderson* v. *Santa Anna*, 116 U. S., 356; *Dentzel* v. *Woldie*, 30 Cal., 138, 145.

The fact that this court had held the original Pima County bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was *res adjudicata* only of the issue then presented, of the facts as they then appeared, and of the legislation then existing.

Congress not only had the power in 1906 to ratify and legalize the collection of the duties in question, but it could in 1906 have laid the same duties retrospectively. Suppose, under the proper exigency,

Congress should impose a tax of $1 on all deeds recorded during the past ten years. No one would question the validity of such an act. It would be an excise tax, operating uniformly and equally. Let us assume that the President, doubting his power to lay and collect the duties in question, had inventoried the cargoes of vessels arriving in the Philippines from the United States, announcing that he would ask Congress to impose a retrospective tax, and suppose Congress had done so, it would be the exercise of a power upon the part of Congress which has been upheld by this court.

The act in question does not go to the extent of laying a retrospective tax, but if the court is of opinion that Congress must not only have had authority to impose the tax originally or to have authorized the President to do so, but must also, at the crucial time (June 30, 1906), have had the power to lay the tax retrospectively, then we contend that Congress had full power to act as it did in this case. The exercise of this power by Congress has been upheld in *Stockdale* v. *Insurance Companies*. (20 Wall., 323.) In that case no valid distinction can be drawn, because the court did not there say *impose*, but "*reimpose* the tax retrospectively." The facts of the case made it necessary to use the word "reimpose." In short, the power of Congress to legalize the collection of the duties in question supplies the deficiency in the power of the Executive to lay and collect them, and it merely confuses the issue to say that Congress is attempting to validate an unconsti-

tutional assumption of power on the part of the President. It is not a question of the power of the President to act in the premises, but of the power of Congress to have imposed these duties on April 11, 1899. The constitutionality of the act of the President is immaterial in arriving at the real question of power involved in this case. Congress had the power at all times, and could therefore ratify afterwards.

In the case of the *Florida Central and Pennsylvania Railroad Company* v. *Reynolds* (183 U. S., 471), the legislature of Florida, in 1885, passed an act laying a retrospective tax upon railroads in that State, which had previously been exempt from taxation, commencing March 1, 1879, 1880, and 1881. This court held that the act did not come within that provision of the fourteenth amendment to the Constitution, which declares that property shall not be taken without due process of law, nor within that provision which declares that all persons shall have equal protection of the laws. The court said:

> If the State, as has been seen, has the power in the first instance to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation.

CONCLUSION.

In conclusion, we would call the attention of the court to the fact that there are no equities in favor of the appellees in this case, and the Government is therefore justified, legally and morally, in employing all proper defenses against the recovery of this money.

The duties were paid into the insular treasury for the support of the Philippine government (R. 24), and were afterwards, it is proper to assume, under the well-recognized laws of trade, recouped from the Filipino people by the importers, who now ask this court to compel the appellants, not to refund money received, but to appropriate money for the payment of something from which they have derived no benefit.

Congress, therefore, having had authority to authorize the collection of these duties in the first instance, has authority now to legalize their collection. Our attention has not been called to a decision of any court or the expression of any text writer where the contrary doctrine has been held to be the law. We submit, therefore, that the validity of the act whereby Congress has sought to ratify and legalize the collection of the duties in question should be sustained.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.
JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.
GEORGE M. ANDERSON,
Special Attorney.

O

FILE COPY.

Office Supreme Court, U. S.
FILED.
APR 19 1907
JAMES H. McKENNEY,
CLERK.

No. 580.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,

v.

CONRAD HEINSZEN AND GUSTAV BROCKMAN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO.

SUMMARY OF THE ATTORNEY-GENERAL'S CLOSING ARGUMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,
v.
CONRAD HEINSZEN AND GUSTAV BROCKMAN, trading as partners under the firm name of C. Heinszen & Co. } No. 580.

SUMMARY OF THE ATTORNEY-GENERAL'S CLOSING ARGUMENT.

In the brief filed on behalf of the appellants it is argued that, whether the ratification of the collection of duties, evidently sought to be ratified by the act of Congress involved in this case, did or did not operate to divest vested rights, such ratification was within the constitutional powers of Congress, and therefore valid. Without in anywise waiving or abandoning the contention thus urged, I propose, during my brief trespass upon the court's attention, to argue that the "right" supposed to be impaired by the legislation in question was not a *vested* right, or even, speaking accurately, a *right* at all.

I venture, in the first place, to point out that, in the present case, there is a special reason for the

application of the well-established principle that this court will not hold an act of the Congress unconstitutional unless the circumstances leave it no other alternative. In the second opinion in the Warner-Barnes case this court indicated what legislative language would indicate unmistakably to its mind the intention of Congress to ratify the collection of the duties in question. Almost immediately after that decision Congress ratified (or attempted to ratify) their collection in precisely the method suggested by this court, thus showing an unmistakable intention on the part of the legislative branch of the Government to take such action. This, however, necessarily involved a deliberate assertion on the part of the Congress that it had the constitutional right to do what it thus clearly and unequivocally attempted to do, so that this court may be confronted by the necessity of declaring a coordinate branch of the Government mistaken as to the limits of its constitutional authority. I submit that this situation justifies and even demands a very careful determination of the question whether any such necessity exists.

What, then, is the "right" claimed to be vested and to be impaired by the ratification? It is not a right to any material and specific property, either real or personal. Title to the money paid by the appellees to the officers who collected these revenues passed (whether rightfully or wrongfully) by delivery; the goods on which the duties were ratified were not lost to the appellees, either wholly

or in part. There is no such situation in this case as existed in the case of the *United States* v. *Lee*, in which the Government sought to deprive individuals of the use and enjoyment of property to which they had a legal title. All that these appellees have ever had which was or could be in anywise affected by the Congressional action claimed to be invalid was a *chose in action;* that is to say, a right to sue the Government for a debt arising from a promise implied in law to repay them money *ex æquo et bono* belonging to them, and therefore by a salutary legal fiction held to have been had and received for their use. Now is such a right to sue the Government a vested right? Is it, properly speaking, a right at all?

It is well settled that, as an attribute of its sovereignty, the Government enjoys an immunity from suit unless by its own permission. This is so clearly true that even when it becomes itself a plaintiff in a civil action the defendant is denied the benefit of the defense of set-off, although this would be open to him in a precisely similar suit brought by a private party. (*State* v. *B. & O. R. R. Co.*, 34 Md., p. 374.) The Congress has indeed permitted claims to be asserted against the Government in the form of suits before special tribunals authorized to hear and determine them under special circumstances and subject to peculiar limitations and regulations, all prescribed by the will of the Congress and subject to change at its pleasure; but these proceed-

ings amount, in last resort, only to an ascertainment for the benefit of the Congress of the fact that, if the Government were a private person, a right of action would exist against it in favor of the claimants. What shall be done as a result of such ascertainment remains entirely within the discretion of the legislative branch of the Government. The Congress may refuse to pay claims thus ascertained, either in whole or in part, and in case of such refusal the claimants possess no means of enforcing their so-called "rights." If the Congress had seen fit to add to the provision ratifying these collections the words "and no moneys heretofore or hereafter appropriated shall be used for their repayment," or words of similar import, the judgment of the Court of Claims would have amounted to the decision of a mere moot question; a right to have such a question decided could hardly be called a "vested right," certainly it would not be a right of property.

I do not feel called upon to discuss the question whether this ratification could be held to deprive the appellee of a right to sue the officers who made the collections individually for money had and received, or on any other ground. It will be time enough to deal with that question when they have asserted such a right. In this proceeding they avoid the effect of the payment by the collecting officers of these funds into the Treasury without notice that the legality of their collection was disputed or their payment by the appellees was in-

voluntary. This question is avoided by suing the Government directly. The suit is founded, not upon a right, but upon a mere privilege or license granted at the pleasure of the National Legislature, and subject at any time, and for any reason satisfactory to the Congress, to be modified, abridged, or taken away altogether. The provision of law whose constitutionality is submitted to the court amounts, at most, to a limitation of this license, an abridgment of this privilege; and, since this court, in dealing with such questions, considers matters of substance and not of mere form, I submit that, in no possible view of the practical effect of this act of the Congress, can it be said to have impaired a vested right or deprived the appellees of anything which can be regarded as property in the light of the constitutional prohibitions.

O

FILE COPY.

Office Supreme Court, U. S.
FILED.
APR 8 1907
JAMES H. McKENNEY,
CLERK

No. 580.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCKMANN, Trading as partners under the firm name of C. HEINSZEN & Co.,
Appellees.

APPEAL FROM A JUDGMENT OF THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

HENRY M. WARD,
Attorney for Appellees,
32 NASSAU STREET,
New York City.

JOHN G. CARLISLE,
PAUL FULLER,
FREDERIC R. COUDERT,
Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

TABLE OF CASES AND AUTHORITIES CITED.

	PAGE
Angle vs. Chicago R. R., 151 U. S., 19	39
App vs. Stockton, 61 N. J. L., 520	56
Auffm'ordt vs. Rasin, 102 U. S., 620	39
Balto. & Susquehanna R. R. vs. Nesbit, 10 How., 395	48
Bartemeyer vs. Iowa, 18 Wall., 140	48
Burgess vs. Salmon, 97 U. S., 381	61
Calder vs. Bull, 3 Dall., 386	44
Cary vs. Curtis, 3 How., 236	27
Chesebrough vs. U. S., 192 U. S., 253	16
Chicago R. R. Co. vs. Chicago, 166 U. S., 235	36
Clinton vs. Strong, 9 Johns., 370	26
Comanche Co. vs. Lewis, 133 U. S., 198	44, 51
Connolly vs. Union Pipe Co., 184 U. S., 540	56
Conway vs. Cable, 37 Ill., 82	56
Cooley on Taxation, 1505, p. 514-5	26, 51
Cromwell vs. MacLean, 123 N. Y., 474	44
Cummings vs. Missouri, 4 Wall., 277	59
DeLima vs. Bidwell, 182 U. S.	4, 6, 9, 28, 31
Dent vs. West Virginia, 129 U. S., 114	36
Dewell vs. Mix, 116 Fed., 664	23
Detroit vs. Martin, 34 Mich., 170	24, 26
de la Cuesta vs. Ins. Co., 136 Pa. St., 62	24
Donovan vs. Penna. Co., 199 U. S., 279	40
Dooley vs. U. S., 182 U. S., 222	4, 30
Dorr vs. U. S., 195 U. S., 138	34
Elliott vs. Swartwout, 10 Pet., 137	29
Erskine, Lord, Speech	15
Fassett, *In re*, 142 U. S., 479	31

PAGE

Fletcher vs. Peck, 6 Cr., 87 62
Florida Central R. R. Co. vs. Reynolds, 183 U. S., 471 37
Flower vs. Lance, 59 N. Y., 603 ..... 24, 26
Freeland vs. Williams, 131 U. S., 405 40
French vs. Barber Asphalt Co., 181 U. S., 324 ...
Grim vs. Weissenburg, 57 Pa. St., 433 57
Guthrie Natl. Bank vs. Guthrie, 173 U. S., 528 ... 51
Hackley vs. Headley, 45 Mich., 569 20
Hamilton vs. Dillin, 21 Wall., 73 ..... 30, 44, 46
Hamilton Special Assessment, § 821 57
Hawker vs. New York, 170 U. S., 201 45
Holden vs. Hardy, 169 U. S., 366 .....
Iowa R. R. Co. vs. Soper, 39 Iowa, 112 57
Keener Quasi Contract, p. 423 24
Kent's Commentaries, vol. 1, 455 64
Lambert vs. County Commrs., 97 U. S., 181 24
Lapeyre vs. U. S., 17 Wall., 206 63
Lennon vs. Mayor, 55 N. Y., 361 41
Lincoln vs. U. S., 197 U. S., 419 ..... 2, 4, 9
" " " 202 " 484 ..... 2, 4, 10
Mattingly vs. District of Columbia, 97 U. S., 687 .. 44, 51
Maxwell vs. Griswold, 10 How., 242 19
National Bank vs. Yankton, 101 U. S., 129 44
New Orleans vs. Clarke, 95 U. S., 644 50
Nichols vs. U. S., 7 Wall., 122 29
Norwood vs. Baker, 172 U. S., 269 49
Nottage vs. Portland, 35 Oregon, 539 56
Ogden vs. Saunders, 12 Wheat., 213 61
Pell, *In re*, 171 N. Y., 48 55
People *ex rel* Hayes vs. Brooklyn, 71 N. Y., 495 .. 53
" " " Nostrand vs. Wilson, 119 N. Y., 515 54
Railroad Co. vs. Rose, 95 U. S., 78, 79 37
Robertson vs. Frank Bros., 132 U. S., 17 19
Saltonstall vs. Birtwell, 164 U. S., 54 29
Satterlee vs. Matthewson, 2 Pet., 380 ..... 44, 47
Sinking Fund Cases, 99 U. S., 710 36
Swift Co. vs. U. S., 111 U. S., 22 26
Stephens vs. Cherokee Nation, 174 U. S., 445 46

PAGE

Stockdale vs. Ins. Co., 20 Wall., 323 37
Street vs. U. S., 133 U. S., 299 ..... 44, 50
Sturgis vs. Carter, 114 U. S., 511 39
Tonawanda vs. Lyon, 181 U. S., 389 .....
Union Pacific vs. Mason City Co., 199 U. S., 160 . 8
Union Transit Co. vs. Kentucky, 199 U. S., 194 ..
United States vs. Burr, 159 U. S., 78 61
" " " Cuba Mail S. S. Co., 200 U. S., 488 ..... 16, 22
United States vs. Edmonston, 181 U. S., 500 26
" " " Lee, 106 U. S., 196 35
Warner Barnes vs. U. S., 197 U. S., 419 ..... 2, 4, 9
" " " " 202 U. S., 484 ..... 2, 4, 10
Wharton on Contracts, Vol. 1, § 147 20
Wight vs. Davidson, 181 U. S., 371 49
Wilkinson vs. Leland, 2 Pet., 627 63

NO. 580.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCTMANN, trading as partners under the firm name of C. Heinszen & Co.,
Appellees.

BRIEF FOR APPELLEES.

Statement.

This is an appeal from a judgment of the Court of Claims in favor of the appellees for the sum of $16,827.31 (R., p., 83), the amount of moneys exacted from the claimants as a military contribution under the guise of customs duties, at the port of Manila, Philippine Islands, by the military authorities under the assumed authority of the order of the President of July 12, 1898, but without warrant of law, upon goods shipped from the United States between April 11th, 1899, the date of the ratification of the treaty with Spain and November 15th, 1901, the date when the tariff enacted by the Philippine Commission took effect.

The petition was filed in the Court of Claims July 1, 1902 (R., p., 1), and an amended petition (which differed from the original in substance, only in that the items and amounts so exacted were correctly stated (Rp. 6–12) on August 20, 1906. The United States demurred to the amended petition (R., p., 12). The Court of Claims after the submission of the case on argument and briefs rendered an opinion overruling the demurrer with leave to plead ; the United States then filed a general traverse, and the case was submitted upon an agreed statement of facts which the Court adopted as its findings of facts (R., pp. 21–24). The facts so found embodied the allegations of the petition, and the Court, without further argument, directed judgment for the amount claimed (R., p. 83). The case is now before this Court on appeal from that judgment.

The facts so found by the Court of Claims are substantially identical with those found by it in the *Warner Barnes* case, and the facts alleged in the petition and admitted by the demurrer in the *Lincoln* case. Those cases were elaborately argued at the October Term, 1904, and decided by the unanimous opinion of the Court, written by Mr. Justice HOLMES, April 3d, 1905 (*Lincoln* and *Warner Barnes & Co., Ltd. vs. United States,* 197 U. S.,419).

Upon the petition of the Attorney-General, in which *it was stated that those were test cases involving similar claims for several mlllions of dollars then pending in the Court of Claims,* a reargument was ordered upon the question of ratification by Congress of the exactions in question.

Reargument was had in January, 1906, both Mr. Attorney-General Moody and Mr. Solicitor-General Hoyt presenting the case for the United States. On May 28th, 1906, this Court rendered its opinion, written by the Chief Justice, adhering to the conclusion previously announced, Mr. Justices WHITE and MCKENNA dissenting (202 U. S., 484). Motion was then made by the attorney for the claimants that the mandate issue forthwith, and, at the suggestion of the

Attorney-General, the Clerk was directed to issue the mandate as soon as the Attorney-General should have read the opinion, and so notified the Clerk. No such notice having been received by the Clerk, and on the 6th of June, 1906, a bill having been introduced in the Senate (No. 6362, 59th Congress first session, a copy of which is printed as Appendix A to this brief), by which all duties collected in the Philippines were in terms ratified " as fully in all respects as if the same had been expressly authorized by an Act of Congress before their levy and collection " (with a proviso that the act should not apply to suits already determined by the Supreme Court), application was made to the Clerk to issue the mandate. This application was granted and the mandate issued accordingly on June 8th, 1906. On the same day judgment was entered on the mandate in the Court of claims in the Warner Barnes case for $71,161.95 and on June 27th, this judgment was reported to Congress by the Secretary of the Treasury for appropriation, but with certain comments upon the merits of the claim. This report is printed as Senate Document 507 and we annex a copy as Exhibit B.

On June 26th the House Committee on Appropriations reported an amendment to the General Deficiency Bill embodying the substance of the Senate Bill 6362. After an earnest debate on the power of Congress so to ratify the exaction of moneys under the guise of customs duties after this Court had held that the exaction was utterly without warrant of law and that claimants were entitled to recover their moneys so exacted, and the presentation to Congress of a letter from the Secretary of War to Mr. Crumpacker, of Indiana, accompanied by *a letter from the Attorney General* in which he stated that he agreed " with the statement of the case made by the Secretary of War," this amendment was adopted by the House.

These letters are printed at pages 9671–2 of the Congressional Record and we have appended copies (Appendices C and D).

In the Senate an argument in opposition to the bill was made by the senior Senator from Alabama upon a motion to amend the bill by striking out the ratification and with the permission of the Senate he had inserted in the Record a statement and brief prepared by counsel for the claimants (Cong. Record, pp. 9769–9776). The only reply to this argument was a motion to lay the amendment on the table which was adopted.

The bill was then passed and on June 30th signed by the President.

In his brief in the Court of Claims in the case at bar, Mr. Assistant Attorney General Van Orsdel states that the questions raised in behalf of the United States were :

(1) Has suit been instituted against the proper parties ?

(2) Has a case of duress against the defendants been made out by the allegations of the petition ?

(3) Has the right of the claimant to recover been barred by failure to protest ?

(4) Has the validating act of June 30, 1906, legalized the collection of duties complained of ?

We understand that in this Court the argument will be confined to two points :

1. Do the findings of fact of the Court of Claims support the conclusion that the payment of the moneys sought to be recovered was involuntary ?

2. Is the Ratification Act of June 30th, 1906, within the power of Congress ?

In the Court of Claims counsel for the claimants took the position that all these questions had been decided adversely to the Government by this Court in *DeLima vs. Bidwell*, 182 U. S., 1 ; *Dooley vs. United States*, 182 U. S., 222 ; *Lincoln and Warner Barnes & Co., Ltd., vs. United States*, 197 U. S., 419 ; 202 U. S., 484.

The Court of Claims in a most able and exhaustive opinion by Judge BARNEY (R., pp. 13-20), held, unanimously : *(a)* that in view of the decisions cited, the questions of procedure, voluntary payment and con-

stitutionality of the ratifying act were not open; *(b)* that considering the question of the power of Congress as an open one, the weight of authority was that "retrospective statutes are valid only to the extent of curing such defects as are in the nature of irregularities, and cannot extend to matters of jurisdiction" (R., p. 20), and that consequently the attempted ratification was unconstitutional and void, and the case, therefore, completely within the decision of this Court in *Lincoln-Warner Barnes vs. United States.*

In view, therefore, of the very elaborate and exhaustive arguments and briefs which have been submitted so recently to this Court in those cases covering completely the two points now again urged in behalf of the United States, and of the express language of this Court in the opinions referred to, we divide this brief into two sections;

The first, under points first and second, that in spite of the fact that the Act of June 30, 1906, was passed since the decision of this Court in the *Lincoln-Warner Barnes case*, the questions now submitted are finally settled by the decisions of this Court in *DeLima vs. Bidwell*, *Dooley vs. United States*, and *Lincoln vs. United States;*

The second, under points third to sixth, that regarding both of these questions as still open, yet the payment was involuntary, and the attempted ratification violates the Constitution.

FIRST POINT.

THE DECISIONS OF THIS COURT IN DE LIMA VS. BIDWELL, DOOLEY VS. UNITED STATES AND LINCOLN, WARNER BARNES VS. UNITED STATES HOLD THAT CONGRESS HAS NOT THE POWER TO RATIFY THE COLLECTION OF MONEYS EXACTED WITHOUT WARRANT OF LAW UNDER THE CIRCUMSTANCES DISCLOSED BY THE RECORD NOW BEFORE THE COURT.

The question as to the power of Congress to ratify the illegal exaction of moneys after suit brought for their recovery, was squarely presented to and decided by this Court in *De Lima vs. Bidwell*, 182 U. S., 1, 199, 200. The amounts involved in that case were exacted from the plaintiff by the Collector of Customs at the port of New York upon sugars imported from Porto Rico in November, 1899.

The action was begun against the Collector on March 13, 1900. On March 24, 1900, Congress passed an act, 31 Stat., 51 (2 Supp. R. S., 1125), which provided that the sum of $2,095,455.88,

> " being the amount of customs revenue *received on*
> " *importations by the United States from Porto*
> " *Rico* * * * to the first of January, 1900,
> " *together with any further Customs revenue col-*
> " *lected on importations from Porto Rico since the*
> " *1st of January, 1900, or that shall hereafter be*
> " *collected under existing law* shall be placed at
> " the disposal of the President to be used for the
> " government of Porto Rico ; * * * and the
> " revenues herein referred to, *already collected*
> " and to be collected under existing law, *are hereby*
> " *appropriated for the purposes herein specified* out
> " of any moneys in the Treasury not otherwise
> " appropriated."

It was insisted upon the argument that this act ratified the collection of the duties involved and *this ques-*

tion went to the root of the plaintiff's right to maintain his action. This Court expressly decided that an act of ratification could

> " clearly have no retroactive effect as to moneys
> " theretofore paid under protest for which an
> " action to recover back had already been brought.
> " As the action in this case was brought March
> " 13, 1900, eleven days before the Act was passed,
> " *the right to recover the money sued for could not*
> " *be taken away by a subsequent Act of Congress.*
> " Plaintiffs sue in assumpsit for *money which the*
> " *Collector has in his hands, justly and equitably*
> " *belonging to them.* To say that Congress could
> " by a subsequent act deprive them of the right
> " to prosecute this action, *would be beyond its*
> " *power.* In any event, it should not be inter-
> " preted so as to make it retroactive. *Kennett's*
> " *Petition*, 24 N. H., 139; *Alter's Appeal*, 67
> " Penn. St., 342; *Norman vs. Heist*, 5 W. & S.,
> " 171; *Donovan vs. Pitcher*, 53 Ala., 411; *Pala-*
> " *ret's Appeal*, 67 Penn. St., 479; *State vs. Warren*,
> " 28 Md., 338" (182 U. S., 199-200).

An examination of the cases cited shows that they are all authorities for the proposition that the Legislature cannot by retroactive laws impair vested rights without violating the provision common to both State and Federal Constitutions,—that no man shall be deprived of his property without due process of law. These cases deal not with questions of irregular or informal assessments, but with laws confiscatory in their nature and leave no doubt as to the precise meaning of this Court in the language quoted.

Far from being, as stated by the Secretary of War in his letter to Mr. Crumpacker (Appendix D, *post* p.) "an *obiter dictum* by Justice BROWN," this was a decision of this Court upon a point directly in issue. Obviously if Congress had the power to ratify the collection of duties after suit brought, the judgment in

DeLima vs. Bidwell must have been for the defendant, and we submit that the language of the Act of March 12th, 1900, is a clear ratification of the collection of the duties on imports from Porto Rico, in that it appropriates all such duties for a specific purpose. When the principal avails himself of the fruits of his agent's act, he clearly ratifies the act itself. An appropriation of moneys collected is the most absolute adoption of the act of collection.

In *De Lima vs. Bidwell* this Court gave judgment for the plaintiff upon two grounds, first that the defendant had exacted money from plaintiff without warrant of law and second that such exaction had not been legalized by Congress. This second ground of the decision was basic, for if the exaction had been legalized the defendant must have been entitled to judgment. The language of the ratifying act showed plainly the actual intention of Congress to approve and ratify the exactions. True, this Court held that the act "should not be interpreted so as to make it retroactive," but why? Not because it was the natural meaning of the language of the act that it should be prospective only in its operation, but because this Court held that after suit brought Congress has *not the power to legalize* the unlawful exaction, and *therefore* under well settled rules the act should be interpreted as intended to accomplish something within, not something beyond, the power of Congress.

It is seldom, if ever proper, for counsel to argue that where two reasons are given by this Court for a decision upon a material point one of these reasons is *obiter*, for if one is, then why not the other, with the absurd result that both are, and there is no binding decision. This Court has very recently stated this well settled doctrine.

> *Union Pacific vs. Mason City Co.*, 199 U. S., 160.

But in *De Lima vs. Bidwell* the conclusion that the act should not be interpreted so as to make it retro-

active is based upon the conclusion that such a retroactive enactment would be beyond the power of Congress with respect to an action pending at the time of its passage. That Congress has not the power is the basis for the interpretation of the act. Neither is an *obiter dictum*, both are correlated decisions upon material points directly involved. The conclusion upon the power of Congress is an integral part of the conclusion upon the interpretation of the act, and constitutes a judicial precedent.

The decision of *DeLima vs. Bidwell* is thus a controlling authority on the proposition that Congress cannot validate the illegal action of the officers of the Government in exacting moneys from these claimants under the guise of duties but without any warrant of law, after, as in the case at bar, suit has been instituted for their recovery.

In the *Lincoln, Warner Barnes* case it was urged in this Court with great insistence both upon the orginal hearing and upon the reargument that the Act of July 1, 1902, ratified the collection of the duties there (as here) involved. This Court *passed upon this question squarely in the first decision (197 U. S., 429).* As in the DeLima case, the question there was twofold (1) the construction of the Act; (2) the power of Congress. Both points were considered and adjudicated. The Court held upon the former question that as the Act of 1902 ratified only such actions of the authorities of the government of the Philippine Islands as were in accordance with the provisions of the order it did not extend to the collection of duties on imports from the United States which was not within its provision. Upon the latter this Court said: "See further *DeLima vs. Bidwell*, "182 U. S., 1, 199, 200;" thereby incorporating and adopting the decision in the DeLima case holding that ratification after suit was brought is beyond the power of Congress. This question of power was the precise point made and argued by the Solicitor-General in that case (197 U. S., 424, 425).

Upon the petition of the Attorney General for rehearing raising this same point again, this Court ordered a rehearing :

> " as to the question whether Congress ratified the
> " collection of the sums sought to be recovered
> " in these suits."

This question was again presented to this Court in a two-fold aspect (1) the construction of the act ; (2) the power of Congress to ratify. In the opinion on the reargument written by the Chief Justice, the Court " adhered to the conclusion previously announced " (202 U. S., 500). While the Court again held that the Act of July 1, 1902, did not by its express terms ratify the duties on imports from the United States exacted after April 11, 1899, but only those on imports from foreign countries up to the time of the passage of the Act of March 8, 1902, and from the United States prior to the ratification of the treaty (202) U. S., 499), it cited and approved the decision in *DeLima vs. Bidwell* upon the question of power. At page 498 (202 U. S.), the Court says :

> " This construction is favored by the considera-
> " tion that *the suits had been begun when the Act*
> " *of July 1,1902, was passed*, and that, *even if* Con-
> " gress could deprive plaintiffs of their *vested*
> " *rights in process of being asserted, (Hamilton vs.*
> " *Dillin*, 21 Wall., 73), still it is not to be pre-
> " sumed to do so on language which, literally
> " taken, has a narrower sense.
>
> " Moreover, the act of July, 1902, was passed
> " with full knowledge and after careful considera-
> " tion of the decisions of this Court, and Con-
> " gress was aware that *grave doubt, at least*, had
> " been thrown upon its power to ratify a tax
> " under circumstances like the present (*DeLima*
> " *vs. Bidwell*, 182 U. S., 1, 199, 200). This affords
> " a special reason for believing that if it had

" intended to *encounter the limitations of that case*
" it would have done so in clear words from which
" there was no escape."

The " limitations of that case " evidently are that *after suit has been brought Congress has not the power to ratify.* On July 1, 1902, many of the suits now pending in the Court of Claims had not yet been brought, so that it may be urged that Congress could then have validated the collection of duties for the recovery of which suit had not been instituted without encountering the limitations in the decision in *De Lima vs. Bidwell.* Clearly, under the decision just quoted, it could not have, as appears to have been attempted by the act now under discussion, ratified the collection of duties, the legality of whose collection was then before the courts.

Hence, under " the limitations of that case " this suit, begun on July 1, 1902, is not affected by the Act of June 30, 1906. It is therefore incumbent upon the Court interpreting this act in accordance with these decisions, to read into the Act of 1906 the words " except with respect to the duties for the recovery of which suits are now pending," in order to sustain it as a constitutional measure *in toto.* Otherwise it must be deemed clearly unconstitutional and void in so far as it purports to affect the suit at bar and other similar suits pending at the time of its passage.

It is fair to assume that Congress intended the act to apply only to those claims which not having been crystallized into suit, the decisions quoted possibly left at the mercy of Congress. In other words, to treat it as a sort of statute of limitations in favor of the Government against those who were not diligent in safeguarding their rights. This would seem to be more consistent with justice than to assume that Congress, actuated by a desire to confiscate, passed a law such as this Court had said " was beyond its power."

This Court has well said that "the supposition that the Government will not pay its debts, or will not do justice is not to be indulged" (*Gibbons vs. U. S.*, 8 Wall., 274).

The Act of 1906 must not be interpreted as in conflict with *De Lima vs. Bidwell* and *Warner Barnes vs. United States*, unless no other construction can be adopted. If the Court cannot adopt the construction suggested, then we submit that the decisions of this Court in *De Lima vs. Bidwell* and the *Lincoln Warner Barnes* case on this point are conclusive and require this Court to hold that with respect to the rights of these claimants and of others similarly situated, the Act of June 30, 1906, is of no effect.

SECOND POINT.

IN VIEW OF THE FINDINGS OF FACT IN THE CASE AT BAR, THE DECISION OF THIS COURT IN DOOLEY VS. UNITED STATES, AND LINCOLN, WARNER BARNES VS. UNITED STATES, ARE CONCLUSIVE UPON THE QUESTION OF VOLUNTARY PAYMENT.

It is now urged in behalf of the United States that claimants have no case because of their alleged failure to make a protest against the exaction of the moneys in suit. It is enough to say that this question was decided in favor of the claimants in the *Lincoln, Warner Barnes* case, and is no longer an open one.

For convenience of reference, we print in parallel columns the findings of fact of the Court of Claims involving the question of voluntary payment in the *Warner Barnes case* with those in the case at bar.

FINDINGS IN WARNER BARNES CASE.

Finding VIII. (40 Ct. Cl. 6).

Upon the arrival of vessels at the port of Manila containing such articles of merchandise the military officer of the United States then acting as Collector of Customs at that port placed said vessels under military guard until they should be duly discharged and no delivery of imported merchandise from such vessels was permitted to be made in said port of Manila to the importer until the duties assessed thereon had been duly paid. The said Collector upon the arrival of vessels containing such imported merchandise prelim inary to the assessment and payment of customs duties thereon required the importer to enter said merchandise for the payment of duty at the Custom House within ninety days after importation. In this case it appears these regulations were conformed to.

FINDINGS IN CASE AT BAR (R., p. 23).

FIFTH. Upon the arrival at the port of Manila, during the years 1899, 1900, and 1901, of all vessels containing merchandise shipped from the United States, including the merchandise so shipped by the claimants, the officer of the United States Army then acting as collector of customs at that port, *placed upon said vessels a military guard, as provided for in the said rules and regulations*, and proceeded to assess, levy, and collect customs duties upon the said merchandise at the rates and *in the manner prescribed in and by said order*, Customs Tariff and Regulations, *with respect to like articles of merchandise imported from foreign countries*, all of which acts of the said military officer acting as collector were done by him in compliance with the terms of the said order, Customs Tariff and Regulations, and amendments thereof, and in conformity with the provisions thereof relating to similar articles imported into the Philippines from foreign countries.

The order itself under which the moneys were exacted specifically provides that the tariff shall be "levied as a military contribution" (R., p. 30) thus negativing at the outset the idea either that a protest would have been considered or that there was anything voluntary about the payment.

The Court of Claims has found as a fact that in exacting the payment of these moneys the military officers complied with the regulations relating to the collection of duties on foreign imports. Upon this point the regulations provide (R., pp. 33, 35):

> "1. Every vessel shall, on arrival, be placed "under military guard until duly discharged.
>
> "3. No vessel shall be allowed to clear for "another port until all her cargo shall be landed "or accounted for. All goods not duly entered "for payment of duty within ten days after their "arrival in port shall be landed and stored, the "expense thereof to be charged against the goods.
>
> "12. No delivery of imported merchandise shall "be made to the importer unless he shall have "duly paid in cash the duties assessed thereon.
>
> "14. Any goods, wares, or merchandise not "duly entered for payment of duty within ninety "days after importation shall be sold at auction "by order of the officer in command of the United "States forces after five days' public notice con-"spicuously posted at the port; provided, that the "period of ninety days may be extended by said "officer not exceeding a period of six months from "the date of importation when good and sufficient "reasons therefor are presented to him, if in his "judgment the interests of the Government will "permit of such extension. The proceeds of such "sale will be kept for ten days subject to the de-"mand of the importer, after deduction of the "proper duties on the goods and all expenses of "storage and sale."

It will be seen from a comparison of these findings in the case at bar, with the findings in the Warner Barnes case, that duress is far more clearly shown here than there. *Protest was neither alleged nor found as a fact in the Warner Barnes case* nor is it alleged or

found here, but from the fact of duress found by the Court, the law raises the conclusion of an involuntary payment of money, to recover which this action may be maintained.

Upon the reargument of the *Lincoln, Warner Barnes* case the point was again clearly made that the absence of protest was a sufficient ground for denying the claim (202 U. S., 495), where the same argument was made and the same cases cited as in the brief now submitted for the United States.

It is seldom proper to assume that because a point made in the argument is not mentioned in the opinion, it has not been considered by this Court. That assumption cannot be made here because the record of the *Lincoln, Warner Barnes* case shows that this point as to a voluntary payment was raised in behalf of the United States not only upon the original argument but upon the application for a rehearing and in the reargument (see "Brief filed (for the United States) under order of Court upon petition for rehearing," pages 22–24, where the protest cases, *Elliott vs. Swartward, Chesebrouyh vs. United States*, etc., etc., are all cited and discussed).

In the *Warner Barnes* case the Court of Claims in its opinion, 40 Ct. Cl., 31, said:

> "So far as appears from the evidence *the privi-*
> "*lege of sailing away with its goods was not pro-*
> "*hibited to the plaintiff*, and while it does appear
> "it was prohibited from landing the goods, with-
> "out first making payment of the duties, this does
> "not deprive such payment of the nature of being
> "voluntary."

An apt answer to this suggestion is to be found in Lord ERSKINE'S speech upon the Orders in Council in 1808. He said:

> "Is it not adding insult to injury to say to America that her shipping is not compelled to come into our ports since they may return back

again? Let me suppose that his majesty had been advised whilst I was a practiser at the bar, to issue a proclamation that no barrister should go into Westminster Hall without passing through a particular gate at which a toll was to be levied on him. Should I have been told gravely that I was by no means compelled by such a proclamation to pass through it? Should I have been told that I might go back again to my chambers with my briefs and sleep there in my empty bag if I liked it? Would it be an answer to a market gardener in the neighborhood of London, if compelled to pass a similar gate erected in every passage to Covent Garden, that he was by no means compelled to bring his greens to market, as he might stay at home with his family and starve?"

"On the subject of tolls, however, let me do justice. Let me not forget the saving proviso which I hear has been introduced into the bill, viz: that those who do not choose to pay it are at liberty to burn their goods, upon payment of expenses. How gracious! * * * A trespass is committed by another man's horse, upon which you immediately impound mine, that had never trespassed; but God forbid that you should be so unjust as to levy the penalty; no; I am at liberty to shoot him in the pound upon paying the poundkeeper's expenses."

Speech of Lord ERSKINE; Hansard's Parliamentary Debates, First Series, vol. 10, p. 966.

We shall not countenance the assumption that so elementary a point was overlooked by this Court, particularly in view of its recent decisions in *Chesebrough vs. United States*, 192 U. S., 253, and *United States vs. Cuba Mail S. S. Co.*, 200 U. S., 488, cases on the very point that voluntary payment precludes a recovery.

We, therefore, submit in conclusion on this point that as there was no allegation or finding of protest in

either the *Lincoln* or *Warner Barnes* case, as the facts found in the case at bar show more clearly than either the facts admitted in the *Lincoln* case, or the facts found in the *Warner Barnes* case, that the payment was involuntary, and as the point that lack of protest precluded recovery was twice argued in the *Lincoln, Warner Barnes* case, the decision in that case is controlling that where the facts show an involuntary payment of moneys exacted wholly without warrant of law by an agent of the United States, and made under duress of goods, lack of protest is not a defense in an action for the recovery of such moneys brought against the United States.

THIRD POINT.

THE FACTS AS FOUND BY THE COURT OF CLAIMS IN THIS CASE ESTABLISH THE LEGAL CONCLUSION THAT THE PAYMENT OF THE DUTIES WAS INVOLUNTARY.

While, as was stated above, we think this question already completely foreclosed by the two decisions in the *Lincoln, Warner Barnes* case as well as in the first *Dooley* case, the insistence of the learned counsel for the Government in again raising and elaborately discussing this question must be our apology for treating it as an original question.

The appellants' proposition here is that there can be " no recovery without protest." Our answer is that where the facts in a case demonstrate payment under compulsion or duress there must be a recovery whether there was protest or not, since protest is only one of many circumstances which may be evidence of the ultimate fact that the payment was involuntary. The unsoundness of the Government's position can, we think, be demonstrated by a simple

and somewhat elementary analysis of the nature of voluntary and involuntary payment and their relation to protest, and while the subject has been recently discussed by this Court in the cases of *Chesebrough vs. United States* and *United States vs. Cuba Mail S. S. Co.* still as the facts there showed a *voluntary* payment, we shall consider the topic at length.

An act is said to be voluntary when it is the result of the free and unfettered choice of the actor. Philosophically the test may be difficult of application since the metaphysician may contend that where the highwayman's pistol is pointing at A's head awaiting the reply to a summons to part with his pocket-book, A still has the choice of either continuing to live, although with a depleted exchequer, or plunging down to Orcus with little hope that his estate will profit by his heroism. The law, however, has no such difficulties to solve, for it deals with men as they are in everyday life. If a man makes a payment because in imminent danger of injury to person or property, his submission is not deemed to make his choice a free one.

If his choice is not free it is clear that the party who has received the money under those circumstances cannot in equity and good conscience retain it, hence the law has provided a remedy.

Thus in every case where this remedy is invoked, there is only one question: Do all the circumstances show that the payment was the voluntary unfettered act of the defendant or was it induced or brought about by such danger to person or property as would have left to the ordinarily prudent man no practical alternative save payment.

The final fact, therefore, to be ascertained by the Court must be not what was the actual state of mind of the plaintiff but what, under the circumstances of the particular case was his "legal state of mind." Was he a volunteer or a victim of overweening necessity.

As this Court has said:

"Now it can hardly be meant in this class of "cases, that to make a payment involuntary, it "should be by actual violence or any physical du- "ress. It suffices, if the payment is caused on "the one part by an illegal demand, and made on "the other part reluctantly and in consequence "of that illegality and without being able to re- "gain possession of his property except by sub- "mitting to the payment. * * * The payment "of the increased duties thus caused was wrong- "fully imposed on the importer and was submitted "to merely *as a choice of evils.*"

Maxwell vs. Griswold, 10 How., 242, 256.

Mr. Justice BRADLEY speaking of that case says:

"In that case (Maxwell v. Griswold, 10 How., "241) it is true the fact that the importer was not "able to get possession of his goods without mak- "ing the payment complained of was referred to "by the Court as an important circumstance; "but it was not stated to be an indispensable "circumstance. *The ultimate fact* of which that "was an ingredient in the particular case *was the "moral duress not justified by law.* When such "duress is exerted under circumstances sufficient "to influence the apprehensions and conduct of a "prudent business man, payment of money wrong- "fully induced thereby ought not to be regarded "as voluntary. But the circumstances of the "case are always to be taken into consideration. "When the duress has been exerted by *one clothed "with official authority or exercising a public em- "ployment, less evidence of compulsion or pressure "is required; as where an officer exacts illegal fees* "or a common carrier excessive charges. But the "principle is applicable in all cases according to "the nature and exigency of each."

Robertson vs. Frank Brothers, 132 U. S., 17, 22, 23.

In the Civil Law the doctrine of duress and the underlying reasoning were systematically worked out:

"In the Roman law we have several rulings to the "effect that *in determining whether consent was ex-*

> " *torted* by fear we are to take into consideration
> " the physical condition, the sex, the mental and
> " nervous condition, the education and the peculiar
> " social and domestic relations of the party
> " threatened."
>
> *Wharton, on Contracts*, Vol. I., § 147.

This is in line with Mr. Justice BRADLEY's reasoning as to the greater presumption of duress where the party is dealing with an official clothed with the power of the State.

Judge COOLEY stated the matter pithily when he said in *Hackley vs. Headley*, 45 Mich. 569, 574, 576 :

> " Duress exists when one by the unlawful act of
> " another is induced to make a contract or per-
> " form some act under circumstances which de-
> " prive him of the exercise of free will."
>
> * * * * * *
>
> " Duress of goods may exist when one is com-
> " pelled to submit to an illegal exaction in order
> " to obtain them from one who has them in pos-
> " session but refuses to surrender them unless the
> " exaction is submitted to. * * * And the
> " mere threat to employ colorable legal authority
> " to compel payment of an unfounded claim is
> " such duress as will support an action to recover
> " back what is paid under it."

This case contains a careful review of the leading English and American cases on the subject.

The rule of law being thus clearly settled, what were the admitted, unquestioned, facts in this case from which the Court must conclude that the payment was involuntary ?

The findings of fact of the Court of Claims (Rec., p. 23) set out the designation by the Commanding General in the Philippines of certain *army officers* to act as collectors of customs at Manila to enforce a certain Customs Tariff and Regulations " *as a military contribution* " (which are annexed to the Record, p. 27). The statement continues (p. 23) :

> " FIFTH. Upon the arrival at the port of Manila
> " during the years 1899, 1900 and 1901 of all

"vessels containing merchandise shipped from "the United States including the mer- "chandise so shipped by the claimants, the "officer of the United States Army then "acting as collector of customs at that Port "*placed upon said vessels a military guard as* "*provided for in the said rules and regulations* and "proceeded to assess, levy and collect customs "duties upon the said merchandise at the rates "and in the manner prescribed in and by said "Order, Customs Tariff and Regulations, with "respect to like articles of merchandise imported "from foreign countries all of which acts of the "said military officer acting as collector were "done by him in compliance with the terms of "the said order Customs Tariff and Regulations, "and amendments thereof, and in *conformity with* "*the provisions* thereof relating to similar articles "imported into the Philippines from foreign "countries."

The said Customs Tariff and Regulations provide (Rec., p. 33) :

"I. *Every vessel* shall on arrival, *be placed under* "*miiltary guard* until duly discharged. * * * "3. No vessel shall be allowed to clear for "another port until all her cargo shall be landed "or accounted for, all goods not duly entered for "payment of duty within ten days after their "arrival in port shall be landed and stored, the "expense thereof to be charged against the "goods. * * *

"14. (Rec., p. 37) Any goods, wares, or mer- "chandise not duly entered for payment of duty "within ninety days after importation *shall be sold* "*at auction by order of the Commandant* after five "days public notice conspicuously posted at the "port."

Thus when the complainants' vessel arrived from the domestic port of New York at the equally domestic port of Manila she found herself and her cargo in possession of Federal troops, whose presence, however otherwise desirable, was designed to and very effectually did prevent claimants from taking posses-

sion of their goods and plying their trade. This situation, so obviously detrimental to plaintiff's property and business, could only be effectually determined by his paying the ransom demanded, *i. e.*, the alleged duties or military contributions—admittedly illegal exactions.

It is true they might have relinquished the goods to the military guard and abandoned their business and property, or again they might have sailed away, but as this Court has said (*vide supra*) *this was only a choice of evils* and one which they were not bound to make. It was in fact no choice at all since the theory of free will cannot hold its own against the doctrine of inevitable necessity in the form of imminent and potentially persuasive bayonets.

The importer whose goods are in the safe-keeping of Krag Jorgensens over whose action he has no control, cannot be successfully likened to the man who buys a revenue stamp from the peaceful apothecary and then sues the government on the ground that he feared the law if he did not stamp his manifest.

> "Where a party pays an illegal demand with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, *or unless to release his person or property from detention*, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."
>
> *United States vs. Cuba Mail S. S. Co.*, 200 U. S., 488, 494.

It seems difficult to contend that under the circumstances disclosed in this record the plaintiff can be thought to have made anything else than a payment under duress of goods. To suppose otherwise would lead to the result that having a free choice Heinszen, actuated by motives of pure philanthropy, chose to donate $16,827 to the Government of the United States.

In view of the fact that the plaintiff is not an American citizen but a German subject, such an unusual occurrence cannot be rested upon any theory of patriotism.

The learned Attorney General has cited a case decided by District Judge PLATT, *Dewell vs. Mix*, 116 Fed. Rep., 664, in which the importer

> " was advised to protest, but as a good citizen
> " and patriotic business man he was disinclined
> " to commit any act which might in any quarter
> " be construed as evincing a disposition to hamper
> " or embarrass the Government in its fiscal rela-
> " tions. Consequently he refused absolutely to
> " protest and at a later date was very much dis-
> " turbed when he learned that during his absence
> " his partner had filed a written protest upon the
> " entry of a small cargo" (p. 665).

Chauvinistic piety of the kind here exhibited may be possible in the case of an American citizen, though we know of no other instance in the books; but the Court can scarcely assume Heinszen to have had any such feeling toward a country not his own.

Nevertheless, the Government's contention seems to be that any and every payment, when there is no proof of protest, is in law voluntary. Thus the wayfarer who bowing to the inevitable surrenders his purse to the pistol of the highwayman in stoic silence is to be construed into a cheerful giver. This is to attach to "protest" some mystic quasi sacerdotal potency such as the ancient Romans attached to certain words and formulas in their contracts.

But modern law knows of no such verbal magic.

Protest is no fetich.

Such an argument is based upon a misconception of the function and value of protest.

The fact to be determined on the evidence is always whether the actor had or had not a free choice; did he act spontaneously or under compulsion? A

statement on his part that he merely yielded to *vis major*, though remaining of the same opinion still, is a most important evidential fact. Taken in connection with other circumstances it may often prove conclusively that a payment was not made through any voluntary desire to benefit the donee, but solely to recover one's liberty or property.

If, as is contended, one who does not protest is a volunteer, then the existence of protest should be conclusive of the character of the payment and every protestant should be allowed his day in Court to challenge the legality of the payment; but this cannot be since it has been repeatedly held that even where there was protest there can be at common law no recovery where there was no compulsion. In other words, the actual fact that there is no compulsion negatives any inference to be drawn from the fact of protest.

As is said by a recent and eminent law author:

> " If, independently of protest, the circumstances
> " under which a payment is made, would not
> " justify a recovery thereof, the fact of payment
> " under protest will not render such payment in-
> " voluntary. In such cases the importance of
> " paying under protest is that *the protest is evi-*
> " *dence* of the plaintiff's intention at the time when
> " payment was made."

Keener Quasi Contract, p. 423, note, citing *Lamborn vs. County Commissioners*, 97 U. S., 181; *Detroit vs. Martin*, 34 Mich., 170; *Flower vs. Lance*, 59 N. Y., 603; *de la Cuesta vs. Ins. Co.*, 136 Pa. St., 62.

In *Lambert vs. County Commissioners*, 97 U. S., 181, 185, 187, this Court through Mr. Justice BRADLEY said:

> " It is settled by many authorities that money
> " paid by a person to prevent an illegal seizure of
> " his person or property by an officer claiming
> " authority to seize the same or to liberate his
> " person or property from illegal detention by
> " such officer may be recovered back in an action
> " for money had and received on the ground that

" the payment was compulsory, or by duress or " extortion. Under this rule, illegal taxes or " other public exactions, paid to prevent such " seizure or remove such detention may be re- " covered back, unless prohibited by some statu- " tory regulation to the contrary * * *.

" Where a party pays an illegal demand with a " full knowledge of all the facts which render such " demand illegal, without an immediate and urgent " necessity therefor, *or* UNLESS *to release his person* " *or property from detention, or to prevent an im-* " *mediate seizure of his person or property,* such " payment must be deemed to be voluntary and " cannot be recovered back. *And the fact that the* " *party at the time of making the payment files a* " *written protest does not make the payment involun-* " *tary.*"

It is thus clear both from the standpoint of sound reasoning and upon the highest authority that protest is nothing more than an evidentiary fact relevant but in nowise conclusive upon the question of voluntary payment.

When all the circumstances show that the actor was in such a situation that he had a free choice, his mere protest that he pays unwillingly will not be sufficient to negative the inevitable inference that his payment was in fact voluntary and not due to overruling necessity.

Compulsion, not protest is the basis of the recovery, hence appellant's proposition that

" there can be no recovery of illegal duties unless paid under compulsion *and with protest at the time of payment*"

is based upon a misapprehension, since compulsion and protest are not independent legal categories but protest (except where required by statute as in the cases cited by the Government) is merely evidence of compulsion.

" A party who has paid voluntarily under a claim of right, shall not afterward recover back the

money, although he protested at the time against his liability" (SHAW, C. J., in Preston v. Boston, 12 Pick., 13).

Detroit vs. Martin, 34 Mich., 170, 177.

"If he voluntarily yielded to the claim and there was *no duress of person or of goods, or fraud on the part of the creditor*, the payment concludes him; and he could not avoid the force or effect of the act of payment as an admission, or reserve the right to draw the matter into controversy, thereafter, by paying under protest."

Flower vs. Lance, 59 N. Y., 603, 610.

Where, on the other hand, the facts indicate compulsion and consequent elimination of freedom of choice there is no necessity of protest to constitute a right of recovery. In such cases, and they include the case at bar, protest is mere surplusage.

In the well known case of *Swift Co. vs. United States*, 111 U. S., 22, 28, 30, the authorities are examined and the principles governing payments under compulsion clearly announced.

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*. * * * No formal protest made at the time is *by statute* a *condition to the present right of action*."

This case is adverted to and its doctrine as to protest reaffirmed in

United States vs. Edmonston, 181 U. S., 500, 514.

See, also, Cooley Taxation, p. 1505.

The case of *Clinton vs. Strong* (1812), 9 Johns., N. Y., 370, closely resembles the case at bar. A

vessel sailing from England before the Non-Intercourse Act (November, 1810) was libelled on arrival in New York, and though subsequently released the Marshal insisted upon payment of his costs before releasing the vessel. The action of the owners to recover the costs so paid was sustained, although there was no evidence of any kind of protest, the Court holding :

> " The payment of the costs could not be con-
> " sidered a voluntary act. They were exacted
> " by the officer *colore officii*, as a condition of the
> " redelivery of the property. It would lead to the
> " grossest abuse, to hold a payment made under
> " such circumstances, a voluntary payment, preclu-
> " ding the party from contesting it afterward."

The position of the Government is based upon a failure to observe the clear distinction between (1) a protest as evidence of involuntary payment at common law ; and (2) protest at common law required as notice to an agent who receives money in order to obviate the defense that he has paid it over to his principal ; and (3) statutory protest in revenue and customs cases.

The first class we have just considered.

The effect of the second class of protest, or notice of dissatisfaction, is to enable the agent to protect himself against an action by retaining the money in his hands.

The action for money had and received is based upon the theory that the defendant has money in his hands which it is unjust and inequitable to allow him to retain, but the basis of the action fails where the agent has, without knowledge of any claim of illegality, paid it over to his principal.

The oft-cited case of *Cary vs. Curtis*, 3 How., 236, 247, formulates the unquestioned rule and its reason :

> " So far as the liability of agents in this form
> " of action appears to have been considered, the
> " general rule certainly is, that the action should

" be brought against the principal and not against
" a known agent, who is discharged from liability
" by a *bona fide* payment over to his principal,
" *unless anterior to making payment over he shall*
" *have had notice from the plaintiff of his right*
" *and of his intention to claim the money. The ab-*
" *sence of notice will be an exculpation of the agent*
" *in every instance.*"

But evidently no question of protest in the sense of notice of dissatisfaction can arise here since the action is against the United States (*i. e.*, the principal) and not the agent—the military collector. This obvious distinction was recognized in the *DeLima case* (182 U. S., p. 179) :

" The fact that the collector may have depos-
" ited the money in the Treasury is no bar to a
" judgment against him since Revised Statutes,
" § 989, provides that in case of a recovery of any
" money exacted by him and paid into the Treas-
" ury, if the Court certifies that there was proba-
" ble cause for the act done, no execution shall
" issue against him, but the amount of the judg-
" ment shall be paid out of the proper appropria-
" tion from the Treasury."

" *The cases which exempt the agent from the suit,*
" *if he has in the meantime paid over the money to*
" *his principal without notice, do not apply.* Here
" is no person but the defendant, against whom
" the suit would in any event be brought, and
" the money was paid by compulsion. It was
" extorted as a condition of granting the clear-
" ance, and not paid with the intent or purpose
" that the collector should pass it to the credit of
" the United States. The case of Snowden v.
" Davis, 1 Taun., 359, lays down this just distin-
" ction, that notice to the agent is not requisite in
" the case of a compulsory payment and one not
" made expressly for the use of the principal.'

The third class of " protest " is the formal notice which customs or revenue statutes require shall be filed in some cases at the time of payment, in others at the time of liquidation of the duty. Protest in this

sense is in the nature of a notice of appeal, as instanced in the protest required by the present Customs Administrative Act.

Protest in the true sense, *i. e.*, as evidence that the payment was involuntary, must be made at or before the time of the payment, as otherwise it would have no relevancy upon the question of whether freedom of choice existed *when the payment was made.*

Statutory protest, on the other hand, may be made at any time permitted by the statute, which, in the case of the existing customs law, is ten days after the liquidation of the entry.

> " The moneys paid by the importer, in order
> " that he may get possession of his merchandise,
> " are forthwith paid into the Treasury of the
> " United States, and *the function of the protest to*
> " *warn the Government of the fact of dissatisfac-*
> " *tion, and to commit the importer to a specific*
> " *statement of the grounds of his objection is equally*
> " *performed, whether made at the time of such pay-*
> " *ment or within ten days after the ascertainment*
> " *and liquidation of the duties.*"
>
> *Saltonstall vs. Birtwell*, 164 U. S., 54, 69.

Counsel for the Government have cited some custom cases as authority on the proposition that duress is not a ground of recovery where there is an absence of protest.

These cases either deal with protest in the sense of notice to an agent or as a statutory prerequisite. Much stress is laid on the case of *Elliot vs. Swartwout*, 10 Pet., 137. The position of the Court there was that no action will lie against a collector when

> " acting in good faith and under instructions
> " from the Treasury Department, and *no protest*
> " *being made at the time of payment or notice not*
> " *to pay the money over, or intention to sue to*
> " *recover back the amount given him*" (headnote. Italics in original.)

On the other hand in the case of *Nichols vs. United States*, 7 Wall., 122, the customs law required a written

protest as a condition precedent to recovery, and this Court merely held that such statutory condition precedent could not be dispensed with. There was nothing here to revolutionize the common-law principle that the fact of duress establishes the conclusion that the payment is involuntary. The statute was clear and mandatory :

> " Nor shall any action be maintained against
> " any collector, to recover the amount of duties
> " so paid under protest unless the said protest
> " was *made in writing and signed by the claimant*,
> " at or before the payment of said duties, setting
> " forth distinctly and specifically the grounds of
> " objection to the payment thereof."

Of course, no such questions can arise here because this is not a Customs case at all. If it had been, the Court of Claims would not have had jurisdiction, nor would there have been any right of action against the Collector. Both these remedies were open to claimant under the decisions in the *De Lima* and *Dooley* cases, because the claim was not one arising under the Customs laws, and hence governed, not by any specific statutory requirements, but by the general rules of the common law.

> *Dooley vs. United States*, 182 U. S., 222, 225–7.

Not only is this not a customs case, but the peculiar circumstances differentiate it from the ordinary case to recover moneys exacted as duties under color of a revenue law. The presence of a military guard on claimants' ship, the seizure of claimants' property by that guard and their orders to sell the property if the moneys exacted as duties were not paid, show that claimants had no " freedom of choice " when the payment was made.

Nor does the decision in *Hamilton vs. Dillin*, 21 Wall., 73, give aid to the Government's contention that the payment here was voluntary.

There the complainant had *voluntarily* applied for a permit to carry on the specially licensed trade, a trade with "enemy country," which trade the President had the power to prohibit *in toto*, and for such permit paid without compulsion a fee to Dillin, the Treasury agent. He then sued Dillin to recover this fee. There was no duress or compulsion of any kind either of person or property in relation to the payment of the fee, for it was paid before the trading was begun. Thus, Hamilton in that case had a "freedom of choice" and exercised it. But, in the case at bar, Heinszen & Co. paid to rescue their goods, which they were transporting in the course of regular and legitimate commerce, to satisfy an unconstitutional and unlawful exaction, made after the goods had been seized and held by military force. Hamilton paid for the privilege of engaging in an illegal and forbidden traffic, but one which the President had the power to license. By purchasing such license Hamilton was not only receiving a *quid pro quo*, but was not submitting to any illegal action since the license fee was properly and lawfully exacted within the power of the President.

In Heinszen's case coercion was conspicuously and picturesquely present; in Hamilton's obviously absent.

The point so strongly urged by the Government that protest should have been made because required by the order under which the duties were collected, and in order to secure a review by the commandant of the decision of the military collector that goods brought from the United States after April 11th, 1899, were imported from a foreign country and so subject to duty, is so fully answered by the decisions of this Court in *In re Fassett, Petitioner*, 142 U. S., 479, 483, and *DeLima vs. Bidwell*, 182 U. S., 175–179, that it does not require discussion. It is disposed of in the opinion of the Court below, succinctly and convincingly. Judge BARNEY says for the Court :

> "It can hardly be successfully maintained that
> "the Government can impose an illegal tax and at

" the same time *prescribe the only means in which* " *objections can be made to its payment*" (Rec., p. 15).

In conclusion upon the question of voluntary payment we respectfully submit:

I. The facts show that the payment was under duress; that no free choice was left the complainant save to pay and retake his goods. Hence the payment was involuntary, and absence of protest is immaterial.

II. Protest is not essential to recovery in this case, because (1) this is not an action against an agent who has paid over in good faith the money to his principal, nor (2) is there any statute making "protest" a condition precedent to recovery.

Therefore the Government's contention that not only compulsion, but also protest, must be proved to sustain this action is untenable.

FOURTH POINT.

THE ACT OF JUNE 30, 1906, IN SO FAR AS IT ATTEMPTS TO DEPRIVE CLAIMANTS HERE OF THEIR RIGHT TO THE MONEYS WHICH THE UNITED STATES HAVE IN THEIR HANDS "JUSTLY AND EQUITABLY BELONGING" TO CLAIMANTS IS UNCONSTITUTIONAL AND VOID.

While we consider as stated in our first point that this question has been determined finally by this Court in the other Insular Cases above cited, nevertheless the insistence of the Government in regarding the decisions referred to as not authoritative on the question of the power to ratify and the expressions therein contained as mere *dicta*, make it proper to examine this point as though the question were a new one and to examine cases *seriatim*, though it may extend this brief beyond the usually desirable brevity.

The proposition of the learned counsel for the United States as expressed in their own language (briefs in Court of Claims) is as follows:

> "The Government takes the position in this case that this act validates the collection of all Tariff duties paid on goods shipped into and from Philippine ports prior to March 8, 1902, and is an effectual bar to the recovery of any of the duties so paid in suits *now pending* or that may hereafter be instituted,"

and in their brief here the statement is made (p. 38) that:

> "The Territories are governed by Congress almost entirely independent of any limitations contained in the Constitution,"

and at page 40:

> "The mistake the Court of Claims made was in assuming that Congress has no power to divest a vested right."

Our answer to this position is:

(1) That at the time of the passage of the Act claimants held the title to the moneys exacted from them by the agents of the United States. Consequently this act is not valid since it attempts to transfer claimants' property to the United States without due process of law and to appropriate it to the public use without compensation; and

(2) That the Federal and State cases cited as upholding certain acts curative of defects and irregularities in taxation have no application to the case at bar, which falls within the purview of the Fifth Amendment.

We need not here discuss the question whether that portion of the Fifth Amendment to the Constitution which provides that no man shall be deprived of his property without due process of law applies to the acts of the governmental authorities in the Philippine

Archipelago. That the Constitution is everywhere applicable to the actions of the Government has been settled by the decisions of this Court, the only open question being as to which clauses extend to governmental operation in the new and as yet "unincorporated" possessions acquired from Spain by the Treaty of Paris.

Dorr vs. United States, 195 U. S., 138, 147, 149.

As the right to property is fundamental we take it that Congress can no more resort to confiscation in the new lands than elsewhere in our broad domain. To continue our career of benevolent assimilation by the renunciation of constitutional limitations in favor of the inviolability of private property has not as yet been seriously mooted.

A. The exaction was admittedly unlawful. There was no mere error of classification but a fundamental lack of jurisdiction. Had the question merely been one arising under the misapplication of customs laws then claimant would have had to follow the remedy provided by the same law or regulation, and the collector himself would have been immune from suit. But with respect to these goods brought from the United States the military collector at Manila stood as would the collector of customs at New York, if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Could Congress after such seizure pass a law ratifying it and imposing duties upon the ship as if it had been at the time of seizure an imported article. Clearly not, we apprehend.

This total lack of basic authority is insisted upon because it serves clearly to differentiate the case at bar from many if not all of the cases cited to sustain appellant's proposition.

Let us assume *arguendo* that instead of money the military collector had taken a piece of the claimant's land; could it be contended or that Congress could

ratify and legalize his act and confirm him or confirm the United States in the possesion of the land as fully to all intents and purposes as if such seizure had been authorized by an act of Congress passed prior to the date when claimant's property was taken, and by such act divest claimant of his title to the land and vest that title in the United States ? It is true that money has no earmarks, but there is no difference in principle because the claimant does not recover his identical dollars. He has the right to recover those very dollars, but because they are " money," this right can be completely satisfied by the payment of other dollars.

In *United States vs. Lee*, 106 U. S., 196, 219, officers of the Government had taken and were holding private property, land, for Government use. They acted, as they believed, in the interests of the Government ; there was no suggestion of any personal moral turpitude in their acts, yet this Court there said :

> " What is that right as established by the ver-
> " dict of the jury in this case ? It is *the right to the*
> " *possession* of the homestead of plaintiff. A right
> " to recover that which has been taken from him
> " *by force and violence and detained by the strong*
> " *hand.*"

Referring to the Fifth Amendment, it was said (p. 218) :

> " If this Constitutional provision is a sufficient
> " authority for the Court to interfere to rescue a
> " prisoner from the hands of those holding him
> " under the asserted authority of the Govern-
> " ment, what reason is there that the same Courts
> " shall not give remedy to the citizen *whose*
> " *property has been seized without due process of*
> " *law and devoted to public use without just com-*
> " *pensation ?*"

The nature of a statute such as the one here involved has been well characterized by a former member of this Court :

> " A statute undertaking to take the property of " A and transfer it to B is not legislation. It " would not be a law. It would be a decree or " sentence, the right to declare which, if it exists " at all, is in the judicial department of the Gov- " ernment. The Act of Congress is little, if any, " more."
>
> STRONG, J., dissenting in *Sinking Fund Cases*, 99 U. S., 710, 738.

> " The great purpose of the requirement (due " process) is to exclude everything that is arbi- " trary and capricious in legislation affecting the " rights of the citizen."
>
> FIELD, J., *Dent vs. West Virginia*, 129 U. S., 114, 124.

It is immaterial that the taking of property assumes the guise of taxation :

> " In determining what is due process of law " regard must be had to substance, not to form."
>
> *Chicago R. R. Co. vs. Chicago*, 166 U. S., 226, 235.

B. Taxation assumes an equivalent; but here the exaction was made because of the act of bringing the goods from the United States, but this act having been performed and completed several years ago and at a time when such act was the common, untrammelled, and untaxed right of all who chose to engage in the Philippine trade, upon what logical or legal theory can it now be taxed ? The property so imported has long since ceased to exist so as to be ascertainable as property. Clearly an attempt now to tax this property would be invalid as without basis. There exists nothing upon which the statute would operate. It is consequently not a tax but an arbitrary transfer of property taken by " the strong hand."

Counsel for the Government say (brief here, pp. 63–64) :

" Congress not only had the power in 1906 to ratify " and legalize the collection of the duties in question,

" but it could, in 1906, have laid the same duties retro-
" spectively. Suppose, under the proper exigency
" Congress should impose a tax of $1 on all deeds re-
" corded during the past ten years. *No one would*
" *question the validity of such an act.*"

The only authorities cited in support of this start-ling if not revolutionary proposition are

Stockdale vs. Insurance Cos. 20 Wall 323
and
Florida Central R. R. Co. vs. Reynolds, 183 U. S. 471.

The *Stockdale* case turned not on the power of Congress to tax retroactively but on the construction of the income tax law of June, 1864, 13 Stat., 281, and the amendatory acts of March 2, 1867, 14 Stat., 477, and July 14, 1870. It was urged in behalf of the insurance companies that under the Act of 1867 the tax on corporate dividends, etc., ceased on December 31st, 1869. The Court held that that act affected only the incomes of individuals, and that the tax imposed on corporate dividends remained in force until Augnst 1st, 1870, when the act of that year, claimed to impose a tax retroactively, in fact terminated this tax.

See the concurring opinion of the Chief Justice and Justice BRADLEY (20 Wall., 333) and *Railroad Co. vs. Rose*, 95 U. S., 78, 79.

That the *Stockdale* case is not an authority on the power of the Legislature to tax retroactively is made evident by the fact that it has never been cited by this Court in any of the numerous decisions herein referred to in which that question is discussed.

In the *Florida Central* case the question before this Court was as stated by Mr. Justice BREWER in announcing the opinion :

" The single question, therefore, to consider is
" whether there is anything in the Federal Con-
" stitution which forbids a State to reach back-
" ward and collect taxes from certain kinds of
" property, which were not at the time collected

" through lack of statutory provisions therefor, or
" in consequence of a misunderstanding of the
" law or from neglect of administrative officials,
" without also making provision for collecting the
" taxes for the same years on other property. It
" will be perceived that there was no new levy of
" taxes. No act of the legislature was passed im-
" posing an additional burden upon the property
" of the State in general, or upon any particular
" property, but the case is one in which *general*
" *levies having been made for the years named*
" certain property which ought to have paid taxes
" under them—and thus contributed its share of
" the expenses of the State—failed to do so, and
" the effort is to compel that property to discharge
" its obligations."

Thus it has recently been held violative of the due process clause for a State to tax a corporation on property not situated within the State. Were this not the rule taxation might become an arbitrary exercise of power, the sheer imposition of penalties.

The principle applied in the case referred is tersely stated in the headnote:

" The power of taxation is exercised upon the
" assumption of an equivalent rendered in the
" protection of the property and person of the
" tax-payer and if such equivalent cannot possibly
" be rendered because the property taxed is wholly
" beyond the jurisdiction of the taxing power, the
" taxation thereof within the domicil of the
" owner amounts to a taking of property without
" due process of law."

Union Transit Co. vs. Kentucky, 199 U. S., 194.

Claimant's right to recover was based upon the actionable wrong done him. This right is property of which he cannot be deprived.

" A right of action to recover damages for an
" injury is property and has the legislature the

" right to destroy such property ? An executive
" may pardon and thus relieve a wrongdoer from
" the punishment the public exacts for the wrong
" but neither executive nor legislature can pardon
" a private wrong or relieve the wrongdoer from
" civil liability to the individual he has wronged."
Angle vs. Chicago R. R., 151 U. S., 1, 19.

Yet, this act, if valid, exercises this very power so emphatically repudiated by Mr. Justice BREWER. The private wrong done claimant by the military collector is fully condoned and he is deprived of his right to sue to recover either from the collector or the Government. Can such a thing be constitutional ?

The answer would seem obvious and elementary :

" The rights of the parties were therefore fixed
" before the new law was passed. The assignee
" had a vested right to the securities, or to their
" value. The legal obligation to return them or
" to pay him their value had been incurred by the
" defendants. To hold that Congress intended by
" this amendatory statute to take away that right
" of action, is to hold that it intended by a retro-
" spective statute to destroy a vested right of
" property or an existing right of action."
Auffm'ordt vs. Rasin, 102 U. S., 620, 622.

In *Sturgis vs. Carter*, 114 U. S., 511 at 519, it is assumed by this Court that if the statute of the State of Ohio under consideration had imposed a tax retroactively it would have been unconstitutional.

The recent decision of this Court in *United States vs. Burr*, 159 U. S., 78, 84, 85, written by Mr. Chief Justice FULLER, leaves no doubt that the same doctrine applies to an Act of Congress.

C. In order to escape the application of those obvious principles the counsel for the Government seek to treat this statute as a curative act designed to heal or validate an irregularity or vice in a tax proceeding. Before attempting to analyze in any detail the cases

cited it may not be inappropriate to set out the general principles governing that class of cases and clearly disguishing them from the case at bar.

The great mass of curative statutes deal with failures to comply with various statutory formalities and requisites which are in their nature not fundamental.

> "Others however", to use the language of the Court of Claims, "belong to an entirely different class and involve the right of the legislative department to cure an entire want of authority of the tax executive to act at all; in other words by retrospection to create a tax which was not a tax before" (R., p. 17).

Nearly all the cases cited by the Government counsel belong to the former category and hence cannot affect this case. One or two cases in the State Courts may be found which seem to support a tax falling into the latter class, but these cases are criticised and questioned by the best text writers and their doctrines repudiated by a nearly unanimous series of State decisions.

As was said recently by this Court in *Donovan vs. Pennsylvania Co.*, 199 U. S., 279, 299, 300:

> "There are cases to the contrary, but in our
> "opinion the better view, the one sustained by the
> "clear weight of authority and by sound reason and
> "public policy is the view we have expressed."

D. Again it must be borne in mind that many if not all the cases in which the curative statute was held valid could well be supported on the theory that the legislative act was an act of *present taxation* analogous to the case of the *Florida Central R. R. Co.* (183 U. S. 471, *supra*), without which property, though legally subject thereto, would have *escaped* taxation.

> "Though it should be held to validate the
> "assessments, it would render them operative
> "from the time of its passage, for it must be

upheld if at all as an exercise of the power of "taxation whereby the legislature adopted the "apportionment and assessment previously made, "and imposed the tax directly upon the property "affected in accordance with such previous assess-"ment."

Lennon vs. Mayor, 55 N. Y., 361, (RAPALLO, J.)

The Legislature has a general power to tax property in the State. Through some mistake or informality of the taxing officers, there is sometimes an irregularity which might allow the tax to be legally avoided. The Legislature finds the property still in the same situation, within its full taxing jurisdiction, and by means of a new law (a curative statute) it in effect imposes a new tax.

A voidable assessment is thus made valid because the Legislature has dispensed with some formality which by prior statute had been made necessary; but it cannot, under the guise of a tax, ratify and legalize a mere tortious seizure—the act "of the strong arm." This distinction and its underlying philosophy have been formulated in a well-known New York case by Mr. Justice PECKHAM, then sitting in the New York Court of Appeals:

"Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner, therefore, still retained his title, the effect of the act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under these invalid leases for a hundred or a thousand years, as the case may be. Has the legislature of this state the right to take the property of A and transfer it to B under the guise of confirming sales made of such land *in invitum*, but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best answer. Property thus taken is not taken by due process of law.

"This is not a case within the principle that

persons who take conveyances of land by deed, or under legal proceedings which lack validity by reason of some omission or informality, take a title or right subject to the power of the legislature to cure such errors or defects by acts of retrospective legislation. Where the proceeding is wholly *in invitum* and the defect of such a nature that no title has passed, the legislature cannot validate or legalize the proceeding to the extent of itself conveying the title under the form of confirming a sale under which no title passed. (See Remarks of BIGELOW, Ch. J., in Denny vs. Mattoon, 2 Allen, Mass., 361, at 382, 383).

" Nor is the legislation in question an exercise of the power to provide rules of evidence and thus to give a certain effect to a deed or lease as presumptive evidence of the validity of proceedings before its execution (People v. Turner, 117 N. Y., 227). Nor does it attempt to set up a statute of limitation providing that, after the expiration of a certain time, it should be conclusively presumed that all proceedings were regular (People v. Turner, *supra;* Ensign v. Barse, 107 N. Y., 329). It is none of these, but a plain, naked transfer of title by legislation. Any statute which should make a tax deed or lease immediately upon its execution conclusive evidence of a complete and perfect title and thus preclude the owner of the original title from showing its invalidity, would probably be void, because it would, in substance, be an unconstitutional transfer or a confiscation of property, instead of a mere law regulating evidence. I do not refer to cases arising under statutes of limitation, where the owner has some appointed time in which to assert his rights, nor to cases resting on principles of equitable estoppel (Cooley on Taxation, 2nd ed., 297 *et seq.).*

" The defendant claims that the act is valid as an exercise of the power to cure defects in assessments and other proceedings for the imposition and collection of taxes. Such curative power is a branch and a part of the legislative power to tax, and must be sustained under it. The legislature undoubtedly has large powers in the way of curing certain defects in proceedings to tax the citizen. In cases where the proceedings have been such that the citizen has had his chance to be heard before the tax was finally imposed, but nevertheless

defects have been discovered in such proceedings, if the thing omitted and which constitutes the defect be of such a nature that the legislature might by prior statute have dispensed with, or if something had been done, or done in a particular way which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute. This was so stated, and in substantially identical language, in Ensign v. Barse (107 N. Y., 329).

"Such act might take away from the taxpayer a defense to the further proceedings against him to collect the tax, which he otherwise would have had (Tifft v. City of Buffalo, 82 N. Y., 204). Yet even in this case I think the taxpayer must be given reasonable time in which to pay a tax thus validated or thus imposed by the legislature. But where the proceedings are so contrary to the provisions of the statute as to result in no valid assessment whatever, and where the sales made under such valid assessment convey no title or interest in the premises to the purchaser, and the original owner has the same title or interest in his property that he ever had, there is no principle upon which to base the power of the legislature under our Constitution by any legislative act to transfer to the purchaser the title to the property of the original owner, which such purchaser would have had if all the proceedings up to and including the sales had been valid. No case can, I think, be found in this state which countenances such doctrine. From People v. Turner (117 N. Y., 227), and Ensign v. Barse (107 *id.*, 329), back through our reports, I have not been able to find a case which points to the existence of a power on the part of the legislature to convey the title of a man's property from him to another by a mere exercise of the legislative will.

"To hold the act under discussion to be valid is to decide that the legislature has such a power.

"What difference does it make to say that the legislature is acting only in the way of validating proceedings to collect a tax which in justice the owner of the land ought to pay? The answer is that the proceedings have been so fatally defective that *no title has passed, and the owner has his title to his property the same as if no tax proceedings had been taken.* Where is the authority in such case

for the legislature to itself *transfer the title to his property to some one else?* If it be proper that he should pay the tax, the legislature might itself tax him, giving him opportunity to be heard in some way *before he must pay as to the amount for which he was liable* (Spencer v. Merchant, 100 N. Y. 585; 125 U. S. 345), or it could provide for further proceedings in order that *a legal tax might be levied, but by no form of words could it legally transfer the title of the owner to his property to some third person.*"

Cromwell vs. MacLean, 123 N. Y., 474, pp. 489–491.

E. In examining briefly the cases relied upon by the Government we will first consider the cases decided by this Court and then the State Court cases adduced.

The first class are all very well known and oft-cited cases, many, if not all of them, having been discussed at this bar in the Warner-Barnes case. They are:

Calder vs. Bull, 3 Dallas, 386.
Satterlee vs. Matthewson, 2 Pet., 380.
Hamilton vs. Dillin, 21 Wall., 73.
Mattingly vs. District of Columbia, 97 U. S., 687.
National Bank vs. Yankton, 101 U. S., 129.
Comanche Co. vs. Lewis, 133 U. S., 198.
Street vs. United States, 133 U. S., 299.

The case of *Calder vs. Bull* can have no relevancy here. The decision was placed by all the Justices upon two grounds:

(1) Under the law and usages of Connecticut the Legislature had a general judicial power of review;

(2) The prohibition against the passage of *ex post facto* laws related only to legislation of a penal nature.

The latter was the only constitutional limitation invoked, since, prior to the passage of the Fourteenth Amendment there was nothing to inhibit State legislatures from enacting laws "taking property without due process," unless thereby the obligation of a con-

tract were impaired. As there was in the case no question of contract, the "impairment" of contract clause could have no bearing. The situation was admirably summed up by Mr. Justice CUSHING in an opinion of civilian terseness and brevity (p. 400):

> "If the act is a judicial act, it is not touched by the Federal Constitution, and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut."

That the Court felt little tenderness toward such laws as the one at bar even at that time is manifest from the expression of Mr. Justice PATTERSON, himself one of the "Framers" (p. 397):

> "I had an ardent desire to extend the provision in the Constitution (as to *ex post facto* legislation) to retrospective laws in general. There is neither policy nor safety in such laws; and therefore I have always had a strong aversion against them. It may in general be truly observed of *retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact.* But on full consideration, I am convinced that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general acceptation, and are not to be understood in their literal sense."
>
> *Calder vs. Bull*, 3 Dall., 386, 397.

This Court has always treated that case as turning upon the question as to whether the legislation was *ex post facto*. It is the leading case on the subject.

> *Hawker vs. New York*, 170 U. S., 201.
> (Dissenting opinion of Mr. Justice HARLAN.)

That the decision may be equally sustained as a mere modification of remedial rights, recent expressions of this Court clearly show.

In *Stephens vs. Cherokee Nation*, 174 U. S., 445, 478,

the Honorable Chief Justice, delivering the opinion of the Court, says citing *Calder vs. Bull* and other cases :

> " And while it is undoubtedly true that legislatures cannot set aside the judgments of Courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances."

Again it said referring to the action of a State in making laws affecting judicial proceedings :

> " *Prior to the adoption of the Fourteenth Amendment*, the power to provide such remedies although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this has been decided in this court are *Calder v. Bull*, 3 Dallas, 386 : *Satterlee v. Matthewson*, 2 Pet., 380 ; *Sampeyrean v. The United States, Watson v. Mercer*, 8 Pet., 88 ; *Finborn v. Smith*, 2 Wall., 160."
>
> *Freeland vs. Williams*, 131 U. S., 405, 420.

Hamilton vs. Dillin (21 Wall., 73) has been so fully discussed both in the briefs and at the bar in the Warner-Barnes case that we hesitate to again attempt to analyze it. Sufficient to say that the regulations there in question were held to be fully within the scope of the Presidential war power. As a makeweight the act directing that the moneys arising " from the fees collected under the rules and regulations made by the Secretary of theTreasury " be paid into the National Treasury was a recognition by the Congress of the power of the President.

> " It will be observed that the law was prospective, *relating to moneys thereafter to be received*, as well as to those already received. This was clearly an implied recognition and ratification of the regulations so far as any ratification on the part of Congress may have been necessary to their validity."

It may be incidentally observed that the ratification in question was a law of precisely the same character as that claimed to validate the exactions sued for in *DeLima vs. Bidwell*, and which this Court held could not take away the plaintiff's right to recover his moneys.

No question of expropriation was argued or invoked, the whole case turning upon the power of the President.

> "It is hardly necessary, under the view we have taken of the character of the regulations in question, to discuss the question of the constitutionality of the act of July 13, 1861, regarded as authorizing such regulations. As before stated, the power of the Government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit is undoubted."

The only three cases cited in the opinion are *Cross vs. Harrison*, *Leitensdorfer vs. Webb*, and *The Grapeshot*, a fairly clear indication of what the real question at issue was. *Nor was "the taking without due process" raised in the argument of counsel* whose names are enough to indicate that any pertinent point would scarcely have escaped attention.

As regards *Satterlee vs. Matthewson*, what has been said as regards *Calder vs. Bull* is equally applicable:

> "If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record,—is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so, but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. All the other objections which have been made to this statute admit the same answer. There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions. * * *
>
> "The objection, however, which was most pressed upon the Court and relied upon

by the counsel for the plaintiff in error was that the effect of the act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description, nor are we aware of any decision of this or any Circuit Court which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract." (*Satterlee vs. Matthewson*, 2 Pet., 412.)

The case of *Baltimore & Susquehanna R. R. Co. vs. Nesbit*, 10 How., 395, was decided upon a similar theory.

The wisdom of later generations has added as limitations upon the powers of the State those which already existed as regards the Federal Government. Thus the old cases even if not otherwise easily distinguishable can have no relevancy to the question at bar nor be considered in conflict with *De Lima vs. Bidwell* (p. 199).

> "Before this amendment and the Thirteenth
> " were adopted, the States had supreme authority
> " over all these matters, and the National Govern-
> " ment, except in a few particulars, could afford
> " no protection to the individual against arbitrary
> " and oppressive legislation."
>
> *Bartemeyer vs. Iowa*, 18 Wall., 129, 140.

> "The Fourteenth Amendment * * * for
> " the first time authorized the former (*i. e.*,
> " Federal Courts) to declare invalid all law and
> " judicial decisions of the State abridging the
> " rights of citizens or *denying them the benefit of*
> " *due process of law.*"
>
> *Holden vs. Hardy*, 169 U. S., 366, 382.

The proposition that neither the Federal Government at any time nor a State since the Fourteenth Amendment can take property without due process

under the guise of the taxing power is made clear in four recent decisions of this Court.

Norwood vs. Baker, 172 U. S., 269.
French vs. Barber Asphalt Co., 181 U. S., 324.
Wight vs. Davidson, 181 U. S., 371.
Tonawanda vs. Lyon, 181 U. S., 389.

These cases are too familiar to require statement. They recognize the principle as settled that while the Fourteenth Amendment does not change the general taxing system in vogue in the various States these systems must not be so applied as to be inconsistent with the due process clause.

In the *Tonawanda* case this Court said of the case of *Norwood vs. Baker*, setting aside a special assessment on the ground that it was confiscatory :

> " It was not the intention of the Court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their Courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States.
>
> " The purpose of that Amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty and property, *as is afforded by the Fifth Amendment against similar legislation by Congress* " (181 U. S., 391-2).

In *Wight vs. Davidson*, Mr. Justice HARLAN said (181 U. S., 387) :

> " It is inconceivable to me that the question whether a person has been deprived of his property without due process of law can be determined upon principles applicable under the Fourteenth Amendment but not applicable under the Fifth Amendment. It seems to me that the words ' due process of law ' mean the same in both Amendments."

In the case of *Street vs. United States*, 133 U. S., 299, Congress had ratified certain acts of the President in reducing the army. As this was a public matter involving no question of property rights we fail to see what relevancy this decision can have.

(*F*) The case of the *National Bank vs. County of Yankton*, 101 U. S., 129, 135, was the common case of validation by legislative act of bonds issued by the local authorities without proper compliance with the statutory prerequisites.

Persons having parted with money on the faith of the bonds it seems but fair and equitable that the legislature or in a proper case Congress should make them good. A municipal corporation is simply a political subdivision of the State, possessing certain delegated power. If in using this power it created against itself claims irrefragable in morals but which may be legally uncollectible by reason of technical defenses, it is eminently just and proper that the State should refuse to allow its agent to take advantage of such technicality. Not only this does not partake of the nature of confiscation, but on the contrary it is based on the theory of restitution, as sound in law as in morals.

> "A city is only a political subdivision of the State, made for the convenient administration of the Government. * * *
>
> In directing, therefore, a particular tax by such corporation and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such a corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."
>
> *New Orleans vs. Clarke*, 95 U. S., 644, 645.

> "It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone.

> The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or its by predecessors from whom it took such benefits."
>
> *Guthrie National Bank vs. Guthrie*, 173 U. S., 528, 537.

The distinction between validating bonds and legislating the property of A over to B is stated by Judge COOLEY with great nicety:

> "But in such cases (*i. e.* invalid bond issue) there is commonly a general power to incur town liabilities, and the particular debt is not void *for want of power to act upon the subject*, but because the power conferred is so restricted as not to embrace it. There is room for saying therefore that the case is one rather of irregularity than of want of jurisdiction. What is more important is, that in such a case there is no adversary or respondent party; the town is acting for itself exclusively, and against no one. Where, however, the town proceeds to levy a tax without authority the case is different; it is then proceeding *in invitum* against individuals who would be entitled, if the proceedings were legal, to have notice and be heard in various stages. If the proceedings are unauthorized by law, no one is legally or morally bound to take notice of them, or can have a legal hearing in respect to them, and a retrospective affirmance would in effect establish valid claims without opportunity to be heard. It is not believed this is competent."
>
> *Cooley on Taxation*, Vol I., pp. 514–15, 3d ed.

Comanche Co. vs. Lewis, 133 U. S., 198, is a case of the same class as *National Bank vs. Yankton*, and the same reasoning applies to it as to the other numerous cases that might be cited along this line.

The case of *Mattingly vs. District of Columbia*, 97 U. S., 687, is again relied upon. It does not treat of any question of violation of the fifth amendment. The statute in question did not do anything more than correct irregularities and adopt as its own the prior assessment made without sufficient authority. The

question of the power of Congress to legislate for the district was discussed, the Court holding the act good, because (p. 690):

> "It (Congress) may, therefore, cure irregularities and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

The procedure was by a bill in equity to restrain the collection of the sums assessed.

Congress by its adoption of the tax made it impossible for the property owner to maintain his injunction, since at the time of trial there was a valid assessment made by act of Congress, the ratifying act, under which the commissioners could lawfully act. In so doing, therefore, no element of a tortious or wholly *extra jurisdictional* character was involved.

G. The State Court cases on the subject of curative statutes are legion. We will make no attempt to cite them all nor to completely harmonize the various expressions in the opinions of the Courts as to the powers of the State legislature, each under its own Constitution, to validate assessments. The learned Court below has examined a number of them and classified them as follows (R., p. 17):

> "Most of these cases present the curative force of statutes applicable to the failure to comply with provisions of law relating to the assessment and collection of the tax, but where the tax itself was not fundamentally illegal; others, however, belong to an entirely different class and involve the right of the legislature to cure an entire want of authority of the tax executive to act at all; in other words by retrospection to create a tax which was not a tax before."

In addition to the cases cited by the Court of Claims as belonging to the first class may be added the following: They are authority for the proposition that a

a wholly *extra jurisdictional* act, such as was the exaction in this case, cannot be given retroactive force so as to divest property.

In *People ex rel Hayes vs. City of Brooklyn*, 71 N. Y., 495, 496, the Common Council attempted to make an assessment for certain improvements which could only be made upon petition of the land owners and after a resolution of the Board of Health or the Common Council, *acting as a Board of Health*, determining that the work was necessary. No such petition was presented and

> " the Common Council did not act as a Board of Health in relation thereto,"

as the law required.

The Legislature having passed an act confirming all assessments theretofore made and levying a tax in conformity therewith which was claimed to validate the assessments in question the Court of Appeals held (pp. 497–8) :

> " We are not called upon to determine in this " case how far the legislative power may be in- " voked and exercised to remedy *irregular and de-* " *fective* proceedings in the assessment of real " estate and it is quite sufficient to say that, so " far as this case is concerned, *there was no juris-* " *diction whatever, and for that reason the pro-* " *ceeding cannot stand.* The learned counsel for " the appellant insists that the language employed " clearly refers to assessments *de facto* as well as " assessments *de jure.*
>
> " It is not apparent how the alleged assessment, " which is absolutely void and of no effect what- " ever, *for want of jurisdiction in the authorities* " *who illegally attempted to impose it, can in any* " *sense be considered as a de facto assessment. It* " *is not in truth an assessment in any respect.* " *Cannot be enforced or collected as such in any* " *lawful manner, and does not possess a single ele-* " *ment of life or vitality. It utterly fails for want* " *of jurisdiction, and cannot be upheld upon any* " *legnl ground.*"

This rule is the settled law of the State of New York.

In *People ex rel. Nostrand vs. Wilson*, 119 N. Y., 515, it appeared that under a legislative power to lay out an assessment district the Common Council fixing such district included in the assessment property not within such district. The Court held (p. 519) that :

> " the point that no remedy is open to the relator
> " for the reason that the assessment has been con-
> " firmed by the Common Council, and that an
> " assessment where so confirmed is declared by
> " the Statute to be final and conclusive is not we
> " think well taken. This provision cannot be con-
> " strued as applying to a case where *the assess-*
> " *ment is utterly void and illegal, and without*
> " *jurisdiction*, People *ex rel.* vs. City of Brooklyn,
> " 71 N. Y., 495."

In all these cases the property was in existence, and new taxes might at any time have been imposed by the Legislature, as explained in the case of *Lennon vs. The Mayor* (55 N. Y., 361, *supra).* But in the case at bar, not only was there no subject matter in existence at the time of the passage of the so-called ratification act upon which the tax could fall, but the tax was not one upon property at all, but upon certain acts done years ago—viz., the bringing of goods from one point in the United States to another. In other words, it is now sought to penalize claimants for having in the past carried on trade between the Philippines and the United States.

Yet even were it possible to argue that the ratification in effect taxed the goods brought into the Philippines by the claimants the law would be equally invalid.

In the words of Mr. Justice HARLAN :

> " The difficulty is not met by saying that, gen-
> " erally speaking, the State when enacting laws
> " may in its discretion make a classification of
> " persons, firms, corporations and associations in
> " order to subserve public objects. For this

" Court has held that classification must always
" rest upon some difference which bears a reason-
" able and just relation to the act in respect to
" which the classification is proposed, and can
" never be made arbitrarily and without any such
" basis. *But arbitrary selection can never be justi-*
" *fied by calling it classification.*"

Connolly vs. Union Pipe Co., 184 U. S., 540, 560.

In the recent New York case of the *Matter of Pell*, 171 N. Y., 48, the Legislature attempted to specifically impose a transfer tax upon remainders vesting prior to June 30, 1885. The tax was held unconstitutional, at page 59 the Court says :

" The tax is, therefore, imposed upon a limited
" class of remaindermen, while others who have
" come into possession and enjoyment, by reason
" of the termination of the life estate long after
" the early date fixed of June 30th, 1885, are not
" taxed.

" The learned counsel for the appellant states a
" very apt illustration in his brief, as follows : ' We
" often hear it declared that the legislature may des-
" ignate watches and carriages as a class of property
" and subject the same to the payment of duties and
" taxes, *but would any one claim that a law, declar-*
" *ing that all watches or carriages which were pur-*
" *chased prior to June 30th, 1885, should be ap-*
" *praised and taxed, could be sustained upon the*
" *ground that such law merely designated a class of*
" *property for taxation'?*

" *Where the statute declares that the owners of a*
" *particular class of property, acquired at a particu-*
" *lar time, shall be taxed, it is equivalent to naming*
" *the owners of such property ; it is in no sense a gen-*
" *eral classification.*"

Yet this is precisely the virtue that the Government claims for the statute at bar. The statute is admittedly aimed at certain particular importers, who, at certain specified times, traded with the Philippines under the sanction of existing laws, and who having been unlawfully subjected to military exactions for so doing have

brought actions against the United States for the recovery of the sums taken from them.

In *App vs. Stockton*, 61 N. J. Law Rep., 520, 523, the Court in passing upon the effect of a curative tax act hold:

> "It need only be said, in answer to a contention made by counsel for the defendants, that the act, etc., can have no application as curative of this assessment. That act only provides against the setting aside of an assessment because of any irregularity or defect in form in assessing the same. In this case the improvment made was wholly unauthorized and the assessment is one which lacks any legal basis whatever."

The Supreme Court of Illinois have recognized this distinction in no ambiguous or qualified terms:

> "In all civilized governments, laws, impairing the validity of contracts and divesting the rights of property are considered unjust and odious. * * * In the case under consideration (a tax sale) the transaction was complete before the law was adopted, and the answer may have relied upon the defects, which are admitted to have existed, but are claimed to have been cured by the act of 22nd February, 1861.
>
> "To give it force, therefore, would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature, that his title should pass from him, and vest in the purchaser at a tax sale which conferred no right. This the legislature have not the power to do, whether by direct or positive action or by rendering valid and binding, acts which were nugatory."
>
> *Conway vs. Cable*, 37 Ill., 82, 90.

Government counsel lay great stress upon three cases in State Courts, Iowa, Oregon and Pennsylvania. These cases are examined in the opinion below and require little comment here.

The first of those cases, *Nottage vs. City of Portland*, 35 Oregon, 539, clearly dealt with an irregularity rather than an absence of all jurisdiction. In any event the

case does not question the generally recognized distinction and the inquiry whether it properly applied the law can have no interest. The decision is based upon the proposition with which we have no quarrel that "such legislation (retrospective) has been held to be lawfully directed to the cure of irregularities in an assessment of property for taxation and the levy of taxes thereon."

In *Iowa R. R. Co. vs. Soper*, 39 Iowa, 112, the decision is not necessarily in conflict with the general principles elsewhere recognized, but the dicta are not in harmony with them. As those expressions seem to us inconsistent with the law in the other States and inconsistent with the decisions of this Court they require no further comment. Suffice it to say that in that case the assessing officers had jurisdiction of the subject matter of the tax which clearly distinguishes the case from the one at bar.

In *Grim vs. Weissenberg*, 57 Pa. St., 433, much relied upon by the Governmnt are found expressions which are characterized by the latest commentator on this class of cases as "dangerously near the border line of confiscation" (*Hamilton Special Assessment*, § 821, Note).

It may be observed, however, that the Commissioners who levied the tax originally had jurisdiction of the subject matter of bounties since they were bounty Commissioners. The expression of the Court as to other Pennsylvania cases may also be appropriate to this one. "The judicial current, indeed, for a long period ran riot in sustaining acts of legislation of the most extreme character," * * * "could take the property of A and give it to B, but in *Norman vs. Heist* repudiated such an idea." The latter is the case cited with approval in *De Lima vs. Bidwell* on this very point of ratification.

It would be a work of supererogation to cumulate authorities further. The State cases may be found classified, and digested in a most recent work: "Law of Special Assessments" by C. H. Hamilton, §§ 816 *et seq.*

FIFTH POINT.

THE SECTION OF THE ACT OF JUNE 30, 1906, UNDER CONSIDERATION IS IN SUBSTANCE AND EFFECT AN EX POST FACTO LAW PROHIBITED BY ARTICLE 1, SECTION 9 OF THE CONSTITUTION.

Regarding this enactment from the point of view of its result and without regard to its form, we find that it deprives claimants and others similarly situated of their property, of their money held by the United States.

The only two grounds upon which under a free government, the State can lawfully deprive any man, citizen or alien, of his property and appropriate it to the public use (without compensation) are, (*a*) by the imposition of taxes for the support of the government; (*b*) by the imposition of a fine or penalty as a punishment for the commission of a wrong.

This enactment cannot be sustained as we have shown as an exercise of the taxing power. We submit that in substance it imposes a fine, penalty or punishment upon claimants for having done an act lawful at the time it was done and one which they had the constitutional right to do freely without paying any penalty. Therefore the enactment while civil in form is penal in its nature and amounts to an *ex post facto* law within the decisions of this Court.

True, that the term *ex post facto* has reference to crimes and penalties, but the question is not of the form of the enactment but of its substance and effect.

What is the substance and effect of this act? The claimants are deprived of their property. Is not that a penalty, a punishment *in substance?* Could Congress on June 30, 1906, have *fined* these claimants in the amounts in suit for having brought their goods in from New York to Manila without the payment of duty for which they were not liable? Clearly not, for such a fine would have been *ex post facto.* Could Congress then

have *fined* the claimants the amount collected by the military authorities as duties for having brought goods from New York to Manila, as at the time they had the right to do freely under the existing laws? Clearly not—the fine would have been *ex post facto*, a penalty for having done an act innocent at the time it was done. But what is the difference in substance and effect between such a fine and this act now before us? The substance and effect are the same; the difference is in form and verbiage only.

But the prohibitions in the Constitution are not to be evaded by mere matter of form. These prohibitions annul every act by which the result which they were intended to prevent might be accomplished.

Thus in *Cummings vs. Missouri*, 4 Wall., 277, at page 325, this Court said:

> "The Constitution deals with substance, not "shadows. Its inhibition was leveled at the thing, "not the name. It intended that the rights of "the citizen should be secure against deprivation "for past conduct by legislative enactment, under "any form, however disguised. If the inhibition "can be evaded by the form of the enactment, its "insertion in the fundamental law was a vain and "futile proceeding. * * *
>
> "By an *ex post facto* law is meant one which im- "poses a punishment for an act which was not "punishable at the time it was committed; or im- "poses additional punishment to that then pre- "scribed; or changes the rules of evidence by "which less or different testimony is sufficient to "convict than was then required.
>
> "In *Fletcher vs. Peck*, 6 Cr., 137, Mr. Chief-Jus- "tice MARSHALL defined an *expost facto* law to be one "" *which renders an act punishable in a manner in* "*which it was not punishable when it was committed.* "" Such a law," said that eminent judge, "*may* "*inflict penalties on the person, or may inflict* "*pecuniary penalties which swell the public treas-* "*ury.* The legislature is then prohibited from "passing a law by which a man's estate, or any "part of it, shall be seized for a crime, which was "not declared by some previous law to render "him liable to that punishment. Why then

"should violence be done to the natural meaning " of words for the purpose of leaving to the legis- " lature *the power of seizing for public use the* " *estate of an individual, in the form of a law* " *annulling the title* by which he holds the estate. " *The court can perceive no sufficient grounds for* " *making this distinction.* This rescinding act " *would have the effect of an expost facto law.* It " forfeits the estate of Fletcher for a crime not " committed by himself, but by those from whom " he purchased. This cannot be effected in the " form of an *ex post facto* law, or bill of attainder; " why then is it allowable in the form of a law an- " nulling the original grant?"

" The act to which reference is here made was " one passed by the State of Georgia, rescinding a " previous act, under which lands had been " granted. *The rescinding act* annulling the title " of the grantees, *did not in terms, define any* " *crimes,* or *inflict any punishment,* or *direct any* " *judicial proceedings;* yet inasmuch as the legis- " lature was forbidden from passing any law, by " which a man's estate could be seized for a crime, " which was not declared such by some previous " law rendering him liable to that punishment, " the chief justice was of opinion that the rescind- " ing act *had the effect of an expost facto law and* " *was within the constitutional prohibition.*

" The clauses in the Missouri constitution, " which are the subject of consideration, do not, in " terms, define any crimes, or declare that any " punishment shall be inflicted but *they produce* " *the same result upon the parties against whom* " *they were directed as though the crimes were de-* " *fined and the punishment was declared.* * * *

" Now some of the acts to which the expur- " gatory oath is directed were not offences at the " time they were committed. It was no offence " against any law to enter or leave the State of " Missouri for the purpose of avoiding enrollment " or draft in the military service of the United " States, however much the evasion of such ser- " vice might be the subject of moral censure. " Clauses which prescribe a penalty for an act of " this nature are within the terms of the definition " of an *expost facto* law. They impose a punish- " ment for an act not punishable at the time it " was committed."

To the same effect is the opinion of this Court in *Ex parte Garland*, 4 Wall., 333.

See, also,

Ogden vs. Saunders, 12 Wheat., 213, 266.
Burgess vs. Salmon, 97 U. S., 381,
and *United States vs. Burr*, 159 U. S., 78, 84.

This point is well illustrated in the opinion below by Judge BARNEY (R., p. 18).

POINT SIXTH.

THE FACT THAT THE BENEFICIARY OF THIS ACT IS THE UNITED STATES AND NOT AN INDIVIDUAL MAKES THE ACT AT ONCE MORE OBNOXIOUS TO ETHICS AND NATURAL JUSTICE, AND MORE CLEARLY AN ACT OF CONFISCATION.

Aside from the requirements of the constitution this act violates every principle of ethics, common honesty, fair dealing and natural justice. We have here a debtor, the United States, which by reason of possessing the attributes of sovereignty cannot be sued without its consent, establishing a court for the express purpose of adjudicating the claims of its creditors and thereby inviting the subjects of all friendly nations to establish their claims; allowing further an appeal from that court to the Supreme Court of the United States. We have the Legislature of the United States providing for the payment of all claims adjudicated by these tribunals. We have a test case brought by a British subject (Warner, Barnes & Co., Ltd.) in which upon appeal this Court adjudges that the claim is valid; we then have the United States so adjudged a debtor petitioning this Court for a rehearing and urging that the case should receive most serious consideration because the decision of this Court in that case *would*

settle the law for many other pending claims including that of the German subject now before this Court, involving several millions of dollars; we have this Court granting a rehearing, an elaborate reargument of the questions involved and a reiteration of the statement by the counsel for the United States that these other claims all depend upon the judgment of this Court in the test case. This Court then announces its adherence to the conclusion already reached which is that the United States has received without right money belonging to the claimants and that it has impliedly agreed to return these moneys. The United States thus adjudicated to be in the debt *of all these claimants*, then passes an act by which it endeavors to repudiate this debt and to confiscate and appropriate to its own use this money.

In the interim, however, between the passage of this act and the argument of the case at bar, the United States has appropriated the money for the payment of the claim of Warner, Barnes & Co., Ltd., the British subject who was fortunate enough to obtain judgment before this act was passed, and the Honorable Secretary of War has gone before the Congress and stated that this judgment is a debt of honor which should be paid (General Deficiency Act of March 3, 1907; Report of Proceedings before House Committee in Appropriations).

Argument is not needed to demonstrate that this act of repudiation is utterly at variance with the fundamental principles upon which the Constitution is based. This Court has uniformly intimated that such an enactment would be held void.

In *Fletcher vs. Peck*, 6 Cr., 87, at 139, this Court, by Mr. Chief Justice MARSHALL, gives an instance of a palpably void act of the legislature which is in substance the very act now under consideration.

> " The Constitution, as passed, gave the Courts
> " of the United States jurisdiction of suits brought
> " against individual States. A State then which
> " violated its own contract was suable in the

" courts of the United States for that violation. " *Would it have been a defense in such a suit to say* " *that the State had passed a law absolving itself* " *from the contract? It is scarcely to be conceived* " *that such a defense could be set up.* And yet if a " State is neither restrained *by the general princi-* " *ples of our political institutions,* nor by the words " of the Constitution from impairing the obligation " of its own contract, such a defense would be a " valid one."

The case now before this Court is almost the very case supposed by the great Chief Justice, but stronger in that the repudiating State is the sovereignty which established the tribunal by which its liability on the contract was to be decided, and that this act has been passed after that tribunal has established its liability.

" It has been suggested, although this procla- " mation did not come into existence until the " 27th of June, that after it did take effect, it re- " lated back to the 24th of that month. *Such a* " *principle is unknown to our laws. It involves the* " *essential effect of a retroactive law.* That a man " should, on the 24th of June, perform an act law- " ful and commendable, that by an official declara- " tion on the 27th this lawful act should be ren- " dered unlawful at the time it was performed, and " punishable, is in violation of every idea of con- " stitutional law and of common right."

Dissenting opinion of Justices Hunt, Miller, Field & Bradley, *Lapeyre vs. United States,* 17 Wall., at 206.

In *Wilkinson vs. Leland,* 2 Pet., 627, an executrix appointed in New Hampshire sold by direction of the Probate Court of that State certain lands in Rhode Island which had belonged to the testator, in order to pay the testator's debts, but without having had the will probated in Rhode Island. She then, in order to clear the title, procured the passage of an act of the Legislature of Rhode Island by which the title was

ratified. The heir of the devisee of the testator brought ejectment against the grantee of the grantee of the executrix. The debts in Rhode Island exceeded the value of the real estate. After pointing out that the only question in the case was as to the power of the Legislature of Rhode Island, and that there was no "Federal question" in the case and that at time Rhode Island had *no written constitution*, this Court, by Mr. Justice STORY said, at page 657 :

> "We know of no case in which a legislative act *to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary it has been constantly resisted as inconsistent with just principles*, by every judicial tribunal in which it has been attempted to be enforced," and at page 660 :
>
> "But it is said, that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority in a government like that of Rhode Island *if it does not divest the settled rights of property.*"

Chancellor KENT in his commentaries (1, 455) says :

> "A retrospective statute affecting and changing
> "vested rights is very generally considered in this
> "country as founded on unconstitutional princi-
> "ples and consequently inoperative and void."

If the ratification in the Act of June 30, 1906, is constitutional, we may well enquire if there is any limit to the power of legislation thus conferred by the application of the doctrine of ratification upon the President. A pertinent enquiry at the present time.

SEVENTH POINT.

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED.

April 8th, 1907.

JOHN G. CARLISLE,
PAUL FULLER,
FREDERIC R. COUDERT,
HENRY M. WARD,
Counsel for Appellees.

APPENDIX A.

59TH CONGRESS, 1ST SESSION. **S. 6362.**

IN THE SENATE OF THE UNITED STATES.

JUNE 5, 1906.

Mr. SPOONER introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To approve, ratify, and confirm tariff duties levied and collected at all ports and places in the Philippine Islands between July twelfth, eighteen hundred and ninety-eight, and March eighth, nineteen hundred and two, and for other purposes.

Whereas in assumed compliance with an order of the President, dated July twelfth, eighteen hundred and ninety-eight, and subsequent amendments, a tariff of duties was levied and collected at all ports and places in the Philippine Islands upon all goods and articles of merchandise imported into the Philippine Islands from foreign countries and from the United States from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two; and

Whereas by the Act of July first, nineteen hundred and two, Congress, by the second section thereof, enacted that "the action of the President of the United States theretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a

tariff of duties and taxes, as set forth by said order, so to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments are hereby approved; and

Whereas in a cause pending in the Supreme Court of the United States that court has decided that the language of section two of the Act of July first, nineteen hundred and two, above quoted, properly construed, only applies to such a tariff of duties levied and collected in the Philippine Islands before April eleventh, eighteen hundred and ninety-nine, and does not extend to and confirm and ratify such duties collected from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two; and

Whereas a claim for a refund of the duties levied and collected between the dates above mentioned, to wit, from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two, is inequitable in that the importers of such goods who are now claiming refunds in fact reimbursed themselves for the payment of the duties by the sale of such goods in the markets in the Philippines at prices which included the duties; and

Whereas *it was the intention of Congress*, although not properly carried into the language of the law, *to approve and ratify what has been done by the President and the officers of the Philippine Government* in the establishment and *collection of a tariff of duties* from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all duties levied and collected by the

authorities of the Philippine Islands, representing the governments of the Philippine Islands and of the United States, at all ports and places in those islands upon all goods and articles of merchandise imported into the islands from foreign countries and from the United States, from July twelfth, eighteen hundred and ninety-eight, to March eighth, nineteen hundred and two, are hereby approved, ratified, and confirmed as fully in all respects as if the same had been expressly authorized by an Act of Congress before their levy and collection: *Provided*, That this Act is not intended and shall not be held to apply to suits to recover duties collected and paid which have been already determined by the Supreme Court.

[ENDORSED.]

59TH CONGRESS, *1st Session.* **S. 6362.**

A BILL

To approve, ratify, and confirm tariff duties levied and collected at all ports and places in the Philippine Islands between July twelfth, eighteen hundred and ninety-eight, and March eighth, nineteen hundred and two, and for other purposes.

BY MR. SPOONER.

JUNE 5, 1906.—Read twice and referred to the Committee on the Judiciary.

APPENDIX B.

WARNER, BARNES & CO., LIMITED, AGAINST THE UNITED STATES.

LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING THE RECORD OF A JUDGMENT RENDERED BY THE COURT OF CLAIMS IN THE CASE OF WARNER, BARNES & CO., LIMITED, AGAINST THE UNITED STATES, IN THE AMOUNT OF $71,161.95, ETC.

JUNE 26, 1906.—Referred to the Committee on Appropriations and ordered to be printed.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, June 25, 1906.

SIR: I have the honor to transmit herewith, for the consideration of Congress, the record of a judgment rendered by the Court of Claims on June 8, 1906, in cause No. 22757, Warner, Barnes & Co., Limited, *v.* The United States, in the amount of $71,161.95. A copy of the mandate of the Supreme Court of the United States, dated June 7, 1906, as certified by the Court of Claims June 8, 1906, accompanies this communication. An appropriation for the judgment is necessary before payment can be made. Attention is invited, however, to the fact that the moneys sued for and recovered in this cause represent duties exacted from plaintiffs upon merchandise shipped by them from New York to Manila and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain were exchanged and the treaty proclaimed, and October 25, 1901. The duties were levied under an order of the President dated July 12, 1898, and were paid into the Treasury

of the Philippine Islands, and no part of such moneys ever reached the Treasury of the United States.

Respectfully,
L. M. SHAW,
Secretary.

The PRESIDENT OF THE SENATE.

COURT OF CLAIMS.

WARNER, BARNES & CO., *v.* THE UNITED STATES.
No. 22757.

I, JOHN RANDOLPH, assistant clerk Court of Claims, hereby certify that the annexed is a true copy of the mandate of the Supreme Court of the United States filed in this office June 8, 1906, in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 8th day of June, A. D. 1906.

JOHN RANDOLPH,
[SEAL.] *Assistant Clerk Court of Claims.*

UNITED STATES OF AMERICA, *ss :*

The President of the United States of America to the honorable the judges of the Court of Claims, greeting:

Whereas lately in the Court of Claims before you or some of you, in a cause between Warner, Barnes & Company (Limited), claimant, and the United States, defendant, No. 22757, wherein the judgment of the said Court of Claims, entered in said cause on the 5th day of May, A. D. 1904, is in the following words, viz:

The court on due consideration of the premises find for the defendants and do order, adjudge, and decree that the petition of the claimants, Warner, Barnes & Company, Limited, be and the same is hereby dismissed.

BY THE COURT.

as by the inspection of the transcript of the record of the said Court of Claims which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS in the present term of October, in the year of our Lord one thousand nine hundred and four, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Claims for further proceedings, in conformity with law.

APRIL 3, 1905.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honnorable MELVILLE W. FULLER, Chief Justice of the United States, the 7th day of June in the year of our Lord one thousand nine hundred and six.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Judgment Rendered by the Court of Claims.

No.	Name of claimant.	Date of Judgment.	Amount.	When presented for payment.	When payable if not appealed.
22757	Warner, Barnes & Co., Limited.	June 8, 1906	$71,161.95	June 8, 1906	Sept. 6, 1906

APPENDIX C.

OFFICE OF THE ATTORNEY-GENERAL,
WASHINGTON, D. C., June 26, 1906.

MY DEAR JUDGE CRUMPACKER: Secretary Taft has brought to my attention the letter which he wrote to you, under date of June 25, concerning the proposed legislation ratifying the collection of duties in the Philippines between the date of the exchange of the ratifications of the treaty and the imposition of a tariff by Congressional authority. I did not argue the case in the Supreme Court when it was originally submitted, but I did move for a rehearing, and applied for leave to argue the case orally, and then made an oral argument. I send you a copy of that argument, which you probably can not at this time read.

I agree with the statement of the case by the Secretary of War. I can not have the slightest doubt that it was the intention of Congress to have ratified the collection of those duties in the original ratifying act, but of course I submit cheerfully to the opinion of the majority of the court to the contrary. These claims are highly inequitable, and it seems to me that it is the duty of Congress to protect the Government against all claims of this class except those which have gone to judgment. In the absence of legislation, I should fear the result of any case brought to recover duties collected during this period on goods coming from all foreign countries, for it would be difficult within the reasoning of the court to contend that the validity of the order imposing the duties did not cease with the war with Spain. Of course, goods coming from Spain during this period are entitled by the treaty to come in upon an equality with goods coming from the United States.

There was no agreement made by this Department, with which I am aware, that the cases in the Supreme Court should be regarded as conclusive of any other cases.

I send this hasty note to you at the request of Secretary Taft.

Sincerely, yours,

W. H. MOODY.

HON. EDGAR D. CRUMPACKER,
Committee on Insular Affairs, House of Representatives.

APPENDIX D.

WAR DEPARTMENT,
WASHINGTON, June 25, 1906.

MY DEAR JUDGE CRUMPACKER: I am very anxious to secure the passage of an act at this session of Congress which shall ratify and legalize the collection of duties, export and import, collected in the Philippine Islands by the provisional military government established by President McKinley and continued under President Roosevelt prior to March 8, 1902, when Congress passed its first Philippine tariff act.

The duties collected between April 11, 1899, the date of the ratification of the treaty of cession, and March 8, 1902, must have aggregated at least $15,000,000 gold. This sum was expended in furnishing a government for Manila and the islands and in public improvements. It was paid chiefly by large importers and exporters who sold their goods at profitable prices including the duties paid, and who enjoyed the benefit and protection of the government which the taxes were expended to support. The money paid as duties never came into the Treasury of the United States at all.

After the insular decisions, in which it was held that the Philippine Islands were territory belonging to the United States, in which the President as Commander in Chief has no power to impose duties on merchandise imported from the United States, Congress passed a law approved July 1, 1902, in the second section of which it was supposed by the War Department that Congress had ratified the duties collected in the islands prior to March 8, 1902. Section 2 is as follows:

"SEC. 2. That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July 12,

1898, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved: *Provided*, That nothing contained in this section shall be held to amend or repeal an act entitled 'An act temporarily to provide revenue for the Philippine Islands, and for other purposes,' approved March 8, 1902."

Before the passage of this act of July 1, 1902, suits had been brought by certain importers against the United States in the circuit court of the United States and in the Court of Claims to recover back duties paid in the Philippines after April, 1899, and prior to March 8, 1902. The United States defended on many grounds, the main one being that there was a state of war due to the insurrection between the two dates which justified the imposition of such taxes as a military exaction, and another being that even if the taxes were illegal when imposed and collected, they were made legal by the ratification of them by Congress in section 2 of the act of July 1, 1902, above quoted.

The Court of Claims upheld the first defense of the United States above stated, to wit, that there was, when the taxes were levied and collected, a state of actual war, in which they were justified as a military exaction, and so did not find it necessary to pass on the question of ratification. The two cases were appealed to the Supreme Court by the claimants, and that court decided that there was no such state of war in the Philippines as to justify the holding of the Court of Claims, and further held that section 2 of the act of July 1, 1902, did not in fact ratify and confirm the duties collected between April 11, 1899, and March 8,

1902, because by its terms it only ratified duties collected in pursuance of the Executive order of President McKinley of July 12, 1898, and subsequent amendments; that the order of July 12, 1898, was a war order, intended to be effective only during the war with Spain, and duties collected after the treaty of peace could not be said to be collected in pursuance of that order, and were, therefore, not within the ratification of the section relied upon.

The result of the decision of the Supreme Court was to increase greatly the number of claims filed in the Court of Claims, so that the aggregate amount claimed amounts to three and one-half millions gold.

A petition for rehearing was filed in the Supreme Court by the Attorney-General urging that an error had been made by the court in failing to not that while the original order of July 12, 1898, might have been limited to the period before the treaty of peace, the section included not only duties collected in pursuance of the original order of July 12, 1898, but also those collected in pursuance of amendments to the order, and that one or more of the amendments were made after the treaty of peace. The petition for rehearing was granted for argument solely on the point whether Congress had ratified the collection of the duties collected and now sought to be recovered. On the rehearing, the court, which had been unanimous in the first hearing divided, a majority affirming their previous decision, while Mr. Justice WHITE and Mr. Justice MCKENNA dissented, expressing the opinion that Congress had ratified the collection of the taxes sought to be refunded and that, as there was no doubt about the power of Congress to ratify, the judgment should be against the claimants. The duties sought to be recovered in these suits are only those imposed on goods coming into the Philippines from the United States; but if the collection of duties on goods coming from the United States was illegal, it is difficult to see how duties imposed by the same authority on goods coming from foreign countries were not equally unauthorized

and illegal and why export duties were not also beyond the power of the Philippine authorities to collect.

In other words, there is very grave danger that under the decision of the Supreme Court and its construction of section 2 of the act of July 1, 1902, claims may be successfully presented and judgment obtained for the whole fifteen millions or more collected and expended in governing the Philippines for two years, so that this burden shall be saddled on the United States, to reimburse the persons who have already reimbursed themselves for the duties they paid in the prices at which they sold the imported or exported merchandise, and who have enjoyed the two years of protection that the Government which these duties supported afforded them. There is, therefore, not the slightest real equity existing in favor of these claimants, and it is right and just that if Congress can by curative legislation in any way defeat these claims, it should do so.

You, who were cognizant of the purpose of the act of July 1, 1902, know that it was the intention of the second section of that act to confirm and legalize the collection of these very duties, but the language selected must have been unfortunate. The court say in its opinion, in effect, that Congress might have used language specifically ratifying these duties, and because it did not do so and used doubtful language, it would construe the section strictly and hold that Congress did not thereby intend to ratify these duties. It seems to me, therefore, that Congress may properly now ratify specifically these duties and come up to the measure set by the court.

It is argued that this proposed act is beyond the power of Congress because it defeats vested rights. If that be true, why did the court consider the question of ratification at all? Why did it give a rehearing on the question whether Congress had in fact ratified the collection of the taxes? Why did it not invite a hearing on the question whether Congress could ratify, and if there were no power to ratify, base its decision on

that conclusive ground? The truth is that the Supreme Court in the case of Hamilton *v.* Dillon (21 Wall., 73), has expressly upheld the power of Congress to ratify taxes collected without authority. The claimants have all along contended that the case of De Lima *v.* Bidwell (182 U. S., 1) was an authority for the proposition that retroactive legislation of this character, especially after suit brought, was unconstitutional. There was in that case *an obiter dictum by Justice Brown*, that after suit brought, it would seem that right to recover duties illegally paid could not be divested by curative or retroactive legislation.

The decision in De Lima *v.* Bidwell, however, was put on a different ground. It is full of significance that if *Justice Brown's dictum had been recognized as law by the court* it would have furnished a conclusive reason for deciding the cases just decided against the United States without any regard to the intention of Congress to ratify the collection of the duties involved, because, as already stated, the act of July 1, 1902, relied on for ratification, was passed after the claims before the court had been filed in the Court of Claims; and yet the court in these cases, not only in its original decision, but also in its order granting a rehearing, and also in its second decision, made the question whether Congress had intended by section 2 of the act of July 1, 1902, to ratify the collection of these duties, the turning point of the case. De Lima *v.* Bidwell, *supra*, is cited by the Supreme Court in the decisions in the present cases not for the point relied on by the claimants, which, as I have said, would have been conclusive and foreclosed all necessity for considering the question of ratification, but merely to the point that the court will strictly construe retroactive legislation of this character.

The mere fact of bringing a suit does not change the nature of a right. If vested before suit, it is vested afterwards. If capable of being lawfully divested before suit, it may be lawfully divested after suit brought. A judgment, of course, changes the nature of a right so that it can not be divested, but until judg-

ment, ratification may take effect. The proper limit to ratification is this, that the depository of authority may ratify any act done by one assuming authority without warrant, and validate the act as against a third party if meantime, *i. e.*, between the act and the ratification, the third party affected has not changed his situation to his injury so as to make the validation of the act inequitable. How have the claimants here changed their situation to their injury in any way by the mere filing of the suits in the Court of Claims? As already said, this proposed act could not invalidate judgments already entered, and does not do so, but it may affect, and ought to affect, pending causes, and it will affect, and ought to affect, the myriad of claims that will be filed hereafter in order to enable the importers and exporters of the islands, most of them foreigners, to eat their cake and have it, too—to collect the duties from the consumers in the prices charged on the one hand, and to collect the duties again from the United States on the other, and also to enjoy the protection of the Government supported by these duties.

If this proposed act is invalid because it attempts to defeat vested rights, a view which the course of the court in these cases does not sustain, then the claimants will not be affected injuriously by it, for it would not prevent the court from giving judgment for the claimants on any of these claims. On the other hand, if the proposed act is within the power of Congress, there is not the slightest doubt of its duty to protect the Government against such inequitable claims by such curative legislation.

I inclose copies of the two opinions of the Supreme Court and the petition of the Attorney-General for rehearing.

Sincerely yours,

WM. H. TAFT.

Hon. EDGAR D. CRUMPACKER,
Committee on Insular Affairs,
House of Representatives.

[31967]

TABLE OF CASES AND AUTHORITIES CITED.

PAGE

Angle vs. Chicago R. R., 151 U. S., 19 39
App vs. Stockton, 61 N. J. L., 520 56
Auffm'ordt vs. Rasin, 102 U. S., 620 39
Balto. & Susquehanna R. R. vs. Nesbit, 10 How., 395 48
Bartemeyer vs. Iowa, 18 Wall., 140 48
Burgess vs. Salmon, 97 U. S., 381 61
Calder vs. Bull, 3 Dall., 386 44
Cary vs. Curtis, 3 How., 236 27
Chesebrough vs. U. S., 192 U. S., 253 16
Chicago R. R. Co. vs. Chicago, 166 U. S., 235 36
Clinton vs. Strong, 9 Johns., 370 26
Comanche Co. vs. Lewis, 133 U. S., 198 ..... 44, 51
Connolly vs. Union Pipe Co., 184 U. S., 540 56
Conway vs. Cable, 37 Ill., 82 56
Cooley on Taxation, 1505, p. 514–5 ..... 26, 51
Cromwell vs. MacLean, 123 N. Y., 474 44
Cummings vs. Missouri, 4 Wall., 277 59
DeLima vs. Bidwell, 182 U. S. 4, 6, 9, 28, 31
Dent vs. West Virginia, 129 U. S., 114 36
Dewell vs. Mix, 116 Fed., 664 23
Detroit vs. Martin, 34 Mich., 170 ..... 24, 26
de la Cuesta vs. Ins. Co., 136 Pa. St., 62 24
Donovan vs. Penna. Co., 199 U. S., 279 40
Dooley vs. U. S., 182 U. S., 222 ..... 4, 30
Dorr vs. U. S., 195 U. S., 138 34
Elliott vs. Swartwout, 10 Pet., 137 29
Erskine, Lord, Speech 15
Fassett, *In re*, 142 U. S., 479 31

PAGE

Fletcher vs. Peck, 6 Cr., 87 62
Florida Central R. R. Co. vs. Reynolds, 183 U. S., 471 37
Flower vs. Lance, 59 N. Y., 603 ..... 24, 26
Freeland vs. Williams, 131 U. S., 405 40
French vs. Barber Asphalt Co., 181 U. S., 324 ...
Grim vs. Weissenburg, 57 Pa. St., 433 57
Guthrie Natl. Bank vs. Guthrie, 173 U. S., 528 ... 51
Hackley vs. Headley, 45 Mich., 569 20
Hamilton vs. Dillin, 21 Wall., 73 ..... 30, 44, 46
Hamilton Special Assessment, § 821 57
Hawker vs. New York, 170 U. S., 201 45
Holden vs. Hardy, 169 U. S., 366 .....
Iowa R. R. Co. vs. Soper, 39 Iowa, 112 57
Keener Quasi Contract, p. 423 24
Kent's Commentaries, vol. 1, 455 64
Lambert vs. County Commrs., 97 U. S., 181 24
Lapeyre vs. U. S., 17 Wall., 206 63
Lennon vs. Mayor, 55 N. Y., 361 41
Lincoln vs. U. S., 197 U. S., 419 ..... 2, 4, 9
" " " 202 " 484 ..... 2, 4, 10
Mattingly vs. District of Columbia, 97 U. S., 687 .44, 51
Maxwell vs. Griswold, 10 How., 242 19
National Bank vs. Yankton, 101 U. S., 129 44
New Orleans vs. Clarke, 95 U. S., 644 50
Nichols vs. U. S., 7 Wall., 122 29
Norwood vs. Baker, 172 U. S., 269 49
Nottage vs. Portland, 35 Oregon, 539 56
Ogden vs. Saunders, 12 Wheat., 213 61
Pell, *In re*, 171 N. Y., 48 55
People *ex rel* Hayes vs. Brooklyn, 71 N. Y., 495 .. 53
" " " Nostrand vs. Wilson, 119 N. Y., 515 54
Railroad Co. vs. Rose, 95 U. S., 78, 79 37
Robertson vs. Frank Bros., 132 U. S., 17 19
Saltonstall vs. Birtwell, 164 U. S., 54 29
Satterlee vs. Matthewson, 2 Pet., 380 ..... 44, 47
Sinking Fund Cases, 99 U. S., 710 36
Swift Co. vs. U. S., 111 U. S., 22 26
Stephens vs. Cherokee Nation, 174 U. S., 445 46

PAGE

Stockdale vs. Ins. Co., 20 Wall., 323 37
Street vs. U. S., 133 U. S., 299 ..... 44, 50
Sturgis vs. Carter, 114 U. S., 511 39
Tonawanda vs. Lyon, 181 U. S., 389 .....
Union Pacific vs. Mason City Co., 199 U. S., 160 . 8
Union Transit Co. vs. Kentucky, 199 U. S., 194 ..
United States vs. Burr, 159 U. S., 78 61
" " " Cuba Mail S. S. Co., 200 U. S., 488 ..... 16, 22
United States vs. Edmonston, 181 U. S., 500 26
" " " Lee, 106 U. S., 196 35
Warner Barnes vs. U. S., 197 U. S., 419 ..... 2, 4, 9
" " " " 202 U. S., 484 ..... 2, 4, 10
Wharton on Contracts, Vol. 1, § 147 20
Wight vs. Davidson, 181 U. S., 371 49
Wilkinson vs. Leland, 2 Pet., 627 63

FILE COPY.

No. 580.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
APR 16 1907
JAMES H. McKENNEY,
CLERK

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCKMANN, Trading as HEINSZEN & Co.,
Appellees.

Oral Arguments of Mr. Coudert and Mr. Ward and Questions by the Justices.

HENRY M. WARD,
Attorney for Appellees,
32 NASSAU STREET,
New York City.

FREDERIC R. COUDERT,
Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

INDEX.

PAGE

Argument of Frederic R. Coudert, Esq.....1–19

Argument of Henry M. Ward, Esq.....19–33

QUESTIONS BY THE JUSTICES..... 11

" " " 12

" " " 15

" " " 21

" " " 22

" " " 23

" " " 24

" " " 25

" " " 26

" " " 33

In the Supreme Court of the United States.

THE UNITED STATES,
Appellants,

vs.

CONRAD HEINSZEN and GUSTAV BROCKMANN,
Appellees.

APRIL 11, 1907.

Argument of Mr. Frederic R. Coudert.

If the Honorable court please : I regret to have received a telegram a few hours ago from Mr. John G. Carlisle, stating that he was very ill and would not be able to be present and take part in the argument, as he expected to do. He has been suffering a great deal for some time past. This of course will leave the claimants hopelessly overweighted by the great array of legal talent on the part of the Government ; and if we did not have two decisions in our favor on precisely the same state of facts, we might feel considerably worried in the premises. However, we believe that the doctrine of *stare decisis* is the law of the land.

Embarrassment, I presume, is a state of mind, which no lawyer ought ever to admit, however often he may feel it ; but I confess some little embarrassment in this case, coming here to argue before this great and learned court upon what must necessarily be the same state of facts upon which we argued before ; I fear

very much that if I should argue for any length of time I should become hopelessly tedious and repetitious. The case might have been interesting the first time; it was probably dull the second time, but it must be a hopeless bore the third time.

There are two questions raised here, which we have argued at the bar three times before, as the record in this case will show. They are, first, the contention that there was no protest, hence no recovery, and, second, that the recent Act of Congress apparently interpreting the other Act of Congress now bar us out of court after our actions are brought.

As to the first question, if your honors please, the question of protest, it is not necessary to say a great deal upon that. Your honors will notice when they look at the records in the Court of Claims, that this case was argued by Mr. Magoon, now Governor General of Cuba. He submitted a dignified brief of 200 pages and made a proportionately dignified oral argument, and in closing he submitted a special brief at the request of the honorable Secretary of War, who deemed the case very important. The case came to this court and was argued by the learned Solicitor General. I have felt his blade often, and nobody knows its keenness better than I. Then by the Attorney General of the United States, now Mr. Justice MOODY—and yet we are told with a certain appearance of gravity and solemnity almost persuasive, that the question of protest was not raised, discussed, argued and disposed of, although one of those plain and elementary questions in a case of this kind that, as the French say, jump into your eye, so that you cannot see anything else. Now, that would be a very extraordinary indictment of all the legal talent which the Government has been able to array against us, and which has subsequently been exalted into such lofty positions, were it not for the fact that the record shows these gentlemen have apparently forgotten what really did take place. I sent up to one of the Justices, in reply

to a query on his part, the record of the opinion in the Court of Claims, in which it is stated that the payments in this case were deemed voluntary by the Court of Claims. When case came here, and that opinion was before the court, a part of the record, was presumably read, I judge from what the learned Justice said a moment ago actually read. Then my learned friend, Mr. Hoyt, in one of the arguments—I do not care which, but in one of the arguments and before the final decision was rendered, argued the question of protest with great fullness and ability, and Mr. Butler, the reporter of the court was so much impressed with it, that he gave half a page of these valuable records of the court to Mr. Hoyt's argument. And we are told, under all these circumstances, that because this honorable court did not deem it wise to devote several pages to the matter, it was evidently overlooked and not decided! That is a proposition which I would not venture to argue any further, the less serious part of one's nature might get the better of one, and your honors would be tempted to look at it from a humorous standpoint. Enough for that.

Now, as to the question of protest on the merits. Was it, after all, so very extraordinary that the court did not find it necessary to write many pages on the subject? The situation was plain in the Warner Barnes case. In this case the circumstances, the facts, the incidents, the surroundings, were precisely the same. In the Warner Barnes case the court found the facts. In this case, there was an agreed statement of facts. I have placed them in the deadly parallel column, and there is no difference whatever. I believe every comma on each side is in its corresponding place.

The situation was simply this, as found as a fact there and as shown by the statement here, that when these goods came into the Philippine Islands, a guard of soldiers went on board of the vessels and took possession of them and we could not get them without the payment of the duty. Now, I take it, that the word *protest* is not one of mystic significance; it is a per-

fectly plain straight matter of common law. Whether a payment is voluntary or not depends upon the state of mind of the actor. A payment may be of two kinds; it may be an involuntary payment or it may not be. My friend cited cases to show that payments were held to be voluntary where the individual protested but the circumstances were such that it was evident his protest was merely a sham and he meant to give the money willingly. On the other hand, the circumstances of duress may be such that whether there be evidence of protest or not is a matter of indifference, because the circumstances make out the duress. In this case our client went on board his ship and found his goods under the fostering care of menacing Krag-Jorgensen rifles, and I presume the new style of very deadly bayonet. Can it possibly be presumed by any reasonable individual that in paying this money under these circumstances he was actuated by a desire to donate sums of money to the Government for the betterment of his people and of mankind generally? Possibly so extraordinary a supposition might be indulged in in the case of an American citizen. It is hardly possible that a subject of Emperor William could be actuated by such considerations, even under the potent persuasion of the aforesaid Krag-Jorgensen rifles. Therefore, it seems to me, that the decision of the court was not so extraordinary, and that it is more probable to assume that they dismissed it without thinking it necessary to write an opinion about it, rather than that they overlooked it in the opinion of the Court of Claims, or in the learned argument of my friend, Mr. Hoyt. That certainly would be an extraordinary assumption. I take it, if your honors please that possibly there may be some little confusion on the point by reason of the three elementary senses in which the word "protest" is used. Protest is merely evidence of an involuntary payment. I presume that if I should at the close of the argument, take up my bag, which I expect to do peaceably and depart as soon as this

argument is over, and I found a gentleman accoutred in the new uniform of the United States, with a bayonet and rifle at hand, who told me he would pass a bayonet through my person unless I gave him a dollar, and I gave him a dollar, it would be difficult to construe me into a cheerful giver, but rather would I be supposed to have paid by reason of the fostering influence of the aforesaid bayonet. The circumstances here were of course precisely similar, and, therefore, the decision of the court was natural. Now, where a little bit of confusion has been raised, at any rate possible in the minds of this court who have decided these cases, is here. Protest has been used in three senses. It has been used in the sense of notice to an agent to warn him not to pay over the money to a principal, as if he should pay it over under those circumstances, then in an action for money had and received, which is nothing but a bill in equity filed at law, it would be against conscience for the plaintiff to force the agent to pay back the money, he not having notified him not to pay it to his principal. The law is stated in the case of Cary vs. Curtis. That of course has no relevance here, because the Government directly took the money, and we are not suing the officer, and protest in the sense of notice of dissatisfaction does not arise at all. Protest is used in a third and statutory sense, that is, that you must make an appeal to the Government under the Customs and Administrative Act, within ten days after bringing in your goods—at any time within ten days. Now, if statutory protests were meant, clearly the protest would have to be at or before the time of taking of the goods, because any later action of the individual to make for himself a case could have no force. That would seem clear, but statutory protest is simply for the protection of the Government, and has been said to be in the nature of an appeal under the Customs Administrative Act, and when we get in the port of New York, and within ten days after do not file some such statement, we have then violated the statute, and are not entitled to our remedy

under the Customs and Administrative Act by going before the board of general appraisers. It is useless to say again what has been repeated so often, that the nature of this case and all these cases is that they are not customs cases at all, and my friend cannot say we should have appealed from one military officer to another military officer in Manila, and proceeded under the regulations. It is not a customs case at all, but is a case where the Collector acted outside of the functions of his office and seized our goods, we had a choice of remedy, to sue him in the State courts, or to proceed as was done by my associates in the Dooley case, under the Tucker Act, and sue the Government in the Court of Claims, because they had received the money directly. Therefore, no question of protest in the sense of notice and no question of protest in the sense of appeal can arise. My friends have cited a case which is interesting, not so much because it is relevant as because it shows an unusual phase of human nature. It is the case of Dewell vs. Mix, the only one which seems to bear out the contention of the Government at all. Mr. Dewell was put on the stand in one of these customs cases, similar to the De Lima case, and it appeared there had been a protest. He stated on the stand that when he discovered that his partners had protested, he was very much annoyed because he was a good American citizen and he wanted to do what he could to support the Government, and he was anxious to withdraw any protest he had made. The underlying reason for bringing the case seems to have been to gratify the fancy of his son, who was a budding attorney. Mr. Dewell said as a good citizen, a patriotic business man, he was disinclined to take any course which might in any quarter be construed as evincing a disposition to tamper or embarass the Government in its fiscal relations. Consequently, he refused absolutely to protest, and at a later date was very much disturbed when he learned that during his absence his partner had filed a written protest upon the entry of a

small cargo. I have searched the books in vain to find a record of so good a patriot in any of these cases, and I think the case is so unusual that it should hardly serve as a precedent, except to show that Mr. Dewell chose to pay, and it is hardly to be assumed that Mr. Heinszen, a German citizen, could possibly have the same motives. He has never expressed them, and there is an absolute difference in the surrounding circumstances, that of Mr. Dewell being a plain case of the collector accepting payment under these circumstances, a statement of Mr. Dewell of his refusal to protest, but that of Mr. Heinszen being one where he was persuaded by the picturesque concomitants of the military guard. I beg the pardon of the court for having said so much upon what seems to me not only an adjudicated but also an elementary point. I presume most elementary points are adjudicated, but this point possesses both of these desirable attributes, and if your honors please, I shall say no more about it. I think I have made myself quite plain, and if I have been so unfortunate as to express myself maladroitly, or with ambiguity, I would be very much pleased to have any inquiries made on the subject that may suggest themselves to your honors. I leave, therefore, that point, to hurry through, for I feel that after having argued the case twice it is due to the court that I should be very brief.

We come now to the question of ratification, already twice argued. I take it that some things in this case are quite settled, and that one of the things settled is that the Constitution controls in these Territories when any particular provision is applicable. That is to say, that it is necessary to determine in each particular case what clause is applicable. My friends intimate very clearly right through that in the Philippine Islands we can take property without due process of law; in other words, that having gone there to civilize those supposedly benighted beings, we can begin by ignoring fundamental rights and teach them the value of confiscatory legislation. I do not propose to argue

that, but I would like to challenge the Attorney-General to know as to whether his view is that the fifth amendment applies, or whether it does not apply to the Philippine Islands, and until he says that he believes it does not apply, I do not propose to argue the proposition. The court, in the Dorr case, stated that which one of these amendments should apply must always be decided when the case arose. Justice BROWN, in speaking for the court in the Mankichi case, and also in the De Lima case, has mentioned this very right as among those rights which are fundamental in their nature, and go with the Government everywhere. Therefore, I will assume, that we are not any more at liberty to confiscate in the archipelago than we are in the States and incorporated Territories of the United States. Am I right? I think I am. I will assume, if your honors please, that being so, the sole question is whether this second act of ratification is or is not confiscatory. My friends have said something about construction. I think it might be possible, if not easy, for trained and subtle legal minds, understanding thoroughly the niceties of the English language, to explain away this statute. I trust no such attempt will be made. I think it could be done. I shall make none. I think that the statute must either stand as constitutional or fall as unconstitutional, and I say further that the question of its constitutionality to my mind, and the Court of Claims took that view and took it promptly and unanimously and forcibly, has been settled by this Court. One of the honorable Justices in the De Lima case said that the decisions should not glimmer like exhalations of a marsh, only to mislead. I do not take it that the two past decisions have anything in their nature of the will-o-the-wisp.

We argued these questions fully, and Mr. Justice HOLMES in writing for the court in the first case, in 197 U. S., in referring evidently to the point of the power of Congress, referred to it in these brief and

eloquent words: "See, further, De Lima vs. Bidwell, page 199. I happen to be very familiar with what was said on page 199, and the court is even more so, and I will not turn to it just now. What was said on page 199 was that Congress did not have the power to do any such thing as it here attempts, and if your honors please, there was a ratification as clear and unequivocal as any ratification could be, because this money that had been taken by the officers illegally, improperly and tortiously was appropriated by Congress to a specific purpose. The court cannot assume that Congress believed it to be stolen funds, and thinking them stolen funds so appropriated them to its own use.

Can any ratification of the acts of persons who collected and segregated funds be clearer than that ratification, and Mr. Justice BROWN, speaking for the court, said that that was unconstitutional. In order to make his language quite plain, he cited a number of cases, half a dozen. We have spoken of them in this court before; we will not repeat them; but those cases involve questions of confiscatory legislation, of turning over the property of A to B by legislative fiat; and if any ambiguity could remain—and I do not think there is any in the language of the learned Justice—the cases which he cites make it quite clear what the point was that he had in his mind.

Yet, it was said in Congress, following the cue coming perhaps from other departments of the Government, that that was a mere dictum of Mr. Justice BROWN. I take it that the dictum was good enough to be decisive of the case, because if the ratification was effective in that case, it was fatal to De Lima's recovery, and the ratification was in terms as I have said, about as clear as a ratification could be. It cannot be supported as a dictum. It was a decision. But if it was a dictum, it was a dictum pregnant with force and potency, because the unanimous court thought it good enough in the 197 U. S. to refer to the mere page upon

which this dictum was expressed as a disposition of the Warner Barnes case then at bar.

If your honors please, assuming, however, that that question is still left open, after two full arguments at this bar, we claim that the act was confiscatory. Certain Federal cases have been cited. It is not necessary for me to analyze or read them. I will assume that this court knows them better than I—Calder vs. Bull, Satterlee vs. Matthewson, and all the rest of them—every one of them passed before the Fourteenth Amendment. In every one of those cases it was said that on the action of the States there were only two inhibitions, namely the impairment of the obligation of a contract and the passage of *ex post facto* laws, and if the action of the States did not fall within either of those categories, it was legal and the legislature had all power over property, however much it might be a divestiture of right, and however deplorable it might be. Mr. Justice PATTERSON, himself one of the framers, of the Constitution, in Calder vs. Bull, said that he wanted to pass such an Act as was embodied in the Fourteenth amendment—"I had an ardent desire to extend the provision in the constitution (as to *ex post facto* legislation) to retrospective laws in general. There is not a policy nor safety in such laws; and therefore I have always had a strong aversion against them," &c.

But the wisdom of later generations came, and we have the fourteenth amendment, and various members of this court, writing for the whole court, in the Tonawanda case, and the case of the Barber Asphalt Company, and in the case of Norwood vs. Baker, have all stated that prior to the fourteenth amendment such things might have been done. We have passed away from that time, and have come I trust to a better age where, as the court has said, the states are subjected to the same inhibition as the federal government, namely, that they cannot take property without due process of law; and due process of law under the fourteenth amendment and in the fifth amendment mean precisely

the same thing. Therefore, the Federal cases cited are irrelevant and inapplicable, and are only of antiquarian interest.

MR. JUSTICE HOLMES : I do not think you noticed that in the second opinion the language was, "even if Congress could deprive plaintiffs of their vested rights in process of being asserted, Hamilton vs. Dillin," etc.—in other words that that case was cited as having possible equal applicability with the case of De Lima.

MR. COUDERT : I am very glad that your honor has called my attention to that case. I remember perfectly the situation there referred to. That was the case the Government had relied upon in discussing this question of power, and I take it that the language in the Warner Barnes case referred to the contention of the Government. I know that the decision went off largely on the question of construction.

MR. JUSTICE HOLMES : It went off wholly, I should say, on the question of construction.

MR. COUDERT : Well, I think that where two questions are involved in a case, you can hardly say that the reason by which they are reached are both dicta. Otherwise, you would have no decision. I take it that the reference to the De Lima case—that case I take it is the law of the land ; was made as a disposition of the question of power. Then the question of ratification was also argued. I take it that the citing of the De Lima case upon this point, shows it was deemed by this court to be the law of the land, that there must be an end to this class of litigation at some time. I take it that the De Lima case is the law of the land, and is spoken of in that particular phase of it, with approval in the first opinion ; in the second opinion the court did not deem it necessary to dispose precisely of the question of power, because as your honor has said, it turned finally upon the question of construction.

My friend has cited bond cases, and I think Mr. Justice HARLAN mentioned certain bond cases. I take it they involve a different principle. I do not take it that the Yankton case can have any relevancy here. I

take it that if a municipal corporation, which is a mere sub-division of the State, should disclaim its obligation, should retain money received from invalid bonds and then the State should attempt to ratify those bonds, the State has a perfect right to ratify them. It simply means that they will appropriate money to pay a just obligation. They may, if they like, appropriate money, I presume, for any legitimate purpose not forbidden by the Constitution, and if they propose to appropriate money to pay the unfortunates who had parted with their money on the strength of apparently good bonds, upon an apparently valid bond issue, that is a perfectly proper thing for the Legislature to do. The municipal corporation has no vested rights not to pay for what it has received. It is a mere sub-division of the State. The State has full jurisdiction over it, and if it chooses to force it to pay for such invalid bonds, it is only fulfilling a moral obligation. It seems to me that those cases are wholly inapplicable. My mind is not subtle enough to perceive the relevancy of those cases to the case at bar, or that there is in them any justification for a deprivation of property by the strong hand. On the other hand, the only deprivation of property is in the case of the unfortunate bond holder, who has paid his money, and would have lost it if the legislature had not given it back to him. Surely the bond holder would have a perfect right to some kind of action, in the nature of restitution, to be made good for the money he parted with.

MR. JUSTICE HARLAN. The case I had in mind was the case of the tax payer.

MR. COUDERT. Curative statutes?

MR. JUSTICE HARLAN. Yes, where the tax payer went into court and said "These bonds have got to be paid by taxation, which will take my property, and I want to enjoin that."

MR. COUDERT. Precisely, if your honor please.

MR. JUSTICE HARLAN. But the legislative department

in the meantime has ratified what the people have inadequately and without authority done.

MR. COUDERT. That was quite good as a present tax. I take it they could do that tomorrow. The obligation of the tax payer would be from the time the legislature passed the act. Say to the tax payer, you receive the benefit, we have the right to tax you for any legitimate object, and then they pass an act which is in effect an original tax. Thus there would be no ground for equitable relief.

As to the case of Hamilton vs. Dillin, your honor will remember that that involved the question of the war power of the President, acting under a statute, to license certain persons to engage in the cotton trade. The argument was that it was unconstitutional, although the statute was very plain, that the President had a right to collect these bounties under such rules and regulations as the Secretary of the Treasury chose to make. It was stated in the body of the case—only three cases were cited, the Leitenderfer v. Webb case and two others along the same line of thought—that such action was fully within the war power of the Executive without a statute, and that the statute gave it to him anyhow. Then in addition it was said that the Act of Congress ratifying particular schedules that the Secretary of the Treasury had made was a proper ratification. It might well be said it was a mere ratification of a particular schedule the treasurer had made, because the President had the power to impose a license tax in any event. Your honors will notice that no stress was laid on the point of ratification, and the question of confiscation was not argued, although Mr. Evarts and some other gentleman of almost equal ability were in that case. It is hardly possible that a question of that importance would have escaped their vigilance. It was not necessary to the decision of the case. Your honors will notice further that that was clearly a case of voluntary payment, because this claimant went and actually bought a license. There were no persuasive

bayonets in that case. There was no force threatened. The man went and bought a license to engage in a particular trade, and if there is anything better than that to indicate the free choice of the individual, I do not know of it. He purchased the license and paid for it and applied to be allowed to engage in this business. He certainly could not say that he was acting under any duress. He was not forced to discontinue any business that he had, and under those circumstances I think what Mr. Justice BROWN said in De Lima case is pertinent—that as far as being voluntary the payments might be ratified as showing the intention of Congress to retain the money. It seems to me there is nothing in that case which militates against the view of this court in the De Lima case. No question of confiscation arose; none was necessary.

If your honors please, there are some State cases which my friend has laid considerable stress upon. A great many of them were so unfortunate as to arise before the fourteenth amendment, and can have little or no relevancy here. I stand on the proposition, as regards those State cases, that was laid down by Mr. Justice PECKHAM when he was in the Court of Appeals in the State of New York, and I do not suppose that anything that has since transpired in this Court has caused him to change his views as expressed in that very careful opinion. He says there:

"What difference does it make to say that the legislature is acting only in the way of validating proceedings to collect a tax which in justice the owner of the land ought to pay? The answer is that the proceedings have been so fatally defective that no title has passed, and the owner has his title to his property the same as if no tax proceedings had been taken."

Now, if your honors please, the point we made in the other argument, and the point we make here is that the legislature has no right to transfer the property of B to A, whether it be under the guise, as Mr. Justice PECKHAM says, of a tax law, or of any other kind of a law. If there be a mere informality, if an assessment

be necessary, it is perfectly proper for the legislature to do something. My friend has cited the Florida case in which certain property had *escaped* taxation. Here no property had escaped taxation. We were traders in the ordinary course of our business, trading where trade was free under our Constitution and it is now attempted to impose a tax on us forsooth because five or six years ago we brought in certain goods. In the Florida case all the land in the State was taxed, railroad lands among others, and by some subterfuge or jugglery, the taxing officers failed to tax the lands of this particular railroad. The legislature simply created a new network or machinery by which those properties which were subject to levy were taxed. It passes my understanding how that is a precedent for a case of this kind.

MR. JUSTICE WHITE: In the case to which Mr. Justice HOLMES has called attention, the Washington or Oregon tax case, my understanding is that under the law at the time the improvement was made, the particular property which was afterwards brought in was not subject to taxation.

MR. COUDERT: Very likely, but the property was there, and when the tax was laid it was good as an original tax—precisely as Mr. Justice PECKHAM has said in the Cromwell case, and as was also said in the Lennon case. In a case of that kind—it is not new doctrine, it is old—the ratification is good as a new tax. The property is there and the property may be subjected to taxation. If the ratification act comes in, the property owner then can no longer say, I am not subject to taxation, because the legislature has the right to tax that specific existing property.

Mr. Justice BREWER has put his finger on it when he says that the question is whether they can go back ten years and say, we will tax you on an importation which was made freely at that time. That is the question and the only question. It is very much as if some gentleman was kind enough to invite me to dinner and than a year afterward to send me a bill and state that

as I received a very good dinner I ought to pay for it. I conceive I would be under no legal obligation to pay for it, although I had received the dinner. It is true we shipped the articles under a regime of practical free trade. Can you go back now and impose a tax? I say no, that is inadmissible. In the Pell case they said, is it possible to contend that the legislature could have taxed watches that were purchased before 1855, or watches indiscriminately, and the court said clearly that would be confiscatory. I ask no better example. It is the same principle, except that this case is much stronger, because it does not pretend to be a property tax, it is a tax on the privilege which a man has a right to exercise or not, and if he had known that he was going to be taxed, he might not have exercised that privilege. You might just as well tax a man, it seems to me, because he had practiced as an attorney twenty-five years ago, although he had been an apothecary ever since. It is an extraordinary proposition, and there is absolutely no authority for it. The Court of Claims cut the gordian knot by saying these questions as to curative statutes can have no force where a tax was fundamentally laid without power. It was not a tax at all. The exaction was called a military contribution. Where an exaction of this kind is without fundamental jurisdiction, it cannot be made good by retroactive legislation, and that is what the State cases claims for it. It is not a question of commissioners acting within a general authority exceeding somewhat the limit of the amount; but here the collectors had no authority whatever. If they had had any and made a mere blunder in the exercise of their jurisdiction over the subject matter, we would have had to proceed under the customs regulations, and we would have had no standing in the Court of Claims. The fact that we had a standing in the Court of Claims shows that their action was fundamentally extra judicial.

If your honors please, we have been met by two or

three extra-legal arguments in the Warner Barnes case. We were told that we were traitors to the flag, and there was an endeavor to prove in the Court below, and the judge advocate general was called to show that among some of Aguinaldo's papers was a draft of Warner Barnes, and that Warner Barnes had therefore been encouraging insurgents. The answer we made was that the Governor General, if that were so, should promptly have decapitated Warner Barnes and the whole Company, and we presume that that would be the proper remedy. But we could hardly see how such an argument could be used in court. No bill of attainder had been passed, and we presume if they had been wrongfully deprived of their property their heirs would have been entitled to it. As Warner Barnes have been paid, and as they are the only people who have been paid, the question of course is not raised again. As that argument cannot be made here we are met with the laws of trade, and we are told that we are outlaws because, forsooth, according to laws of trade—I used to think there were only Democratic laws of trade, but I believe they have been adopted now by the dominant party—the consumer pays the tax, and therefore under this newly vitalized and now sanctified rule, we must have recouped ourselves. The answer is that in every possible customs case that we have known of that same argument might as well have been made, and it would be a very convenient thing for the Government to divest itself of all liabilities for improper exactions and levies of any kind. I take it when the assessments in New York real estate were raised nearly double, that any of us who were fortunate enough to possess any property tried to raise our rents accordingly, but I have never known of any landlord who suing for an illegal tax being met with the answer, "Why, you raised your rent and the tenant paid it." In addition to that, as the gentlemen have gone out of the record, I may say for their benefit that most of these Philippine com-

panies are pretty nearly bankrupt and many of these goods they have never been able to sell at all.

The situation here is a little peculiar. It would be almost funny if it did not rise almost to the dignity of a diplomatic incident. We were invited by the Government to go into the Court of Claims. Under the treaty with Great Britain and with Germany, British and German subjects are entitled to sue in the Court of Claims provided reciprocal rights are accorded to our citizens on the other side of the water. A British citizen sues. Mr. Heinszen and numerous other claimants sue, and they are met in this court by the Attorney General who informs this honorable court that these claimants must stand or fall on the case of Warner Barnes. It was not necessary therefore for us to come here with 250 or 300 cases. We supposed that one was enough, and Mr. Heinszen, the German subject, was satisfied to abide by the result as a test case. Twenty-four hours afterwards the Britisher finds himself paid, and the German who is given similar rights finds that while his brother who has brought the suit has been paid, he had been thrown out of court, and he is told that he has no redress. Such a result is very extraordinary, and why the Government should discriminate against a subject of the Emperor William and in favor of a subject of King Edward I do not know. I leave that to the respective ambassadors.

If your honors please, I thank you for having borne with me so long in an argument that must surely seem repetitious. We claim that the question of protest is a merely trumped up issue that was here before, that this particular statute is what the other was or attempted to be, although expressed inartistically, confiscatory, and therefore unconstitutional. I have stated the extraordinary situation of the test case having been disposed of, and these other cases attempted to be relegated to the limbo of forgotten and just claims; and I ask the Attorney General to say whether under all these circumstances he as

a fair minded man thinks that accords with a square deal; and if it is not a square deal, in what way and under what view and on what theory it is constitutional, and not the taking of property without due process. I thank the Court for their kind attention.

Argument of Mr. Henry M. Ward.

If your Honors please, I shall take up immediately this question of the power of Congress to ratify, and say only a few words about the question of protest or voluntary payment. On that question I merely wish to correct one statement which I think Mr. Van Orsdel made, that it was the military collectors who took possession of these goods on the vessels. The record shows, and it is found as a fact by the Court, that the military collectors of customs, as soon as these vessels arrived, placed them *under a military guard*, in conformity with the regulations. The Court found that the regulations required that every vessel on its arrival should be placed *under a military guard, that no delivery of imported merchandise should be made from the custody of that military guard until the payment of the duties.* Of course, as we have said, this was all before the Court in the Warner Barnes case, and the findings of fact in this case are the same in that respect as in that case, except that the facts in this case are stronger in our favor on the question of duress.

Now, as to the power of Congress to ratify the collection of these duties, and the question of the violation of the Fifth Amendment. Let us consider for a moment what this Court did decide in the *Warner Barnes* case as reported in 197 U. S. 419, and 202 U. S. 484, and in the first Dooley case 182 U. S. 222. It decided that these moneys were exacted from our clients for the period of nearly three years as a military contribution, under the guise of customs duties, but absolutely without warrant of law; that these moneys were taken by the agent of the United States

and turned over to the United States, and are in its possession, and that they are our moneys and that we had the right to sue the United States for their recovery in an action for money had and received. And, as was suggested by the Court in the De Lima case, these were moneys legally and equitably belonging to the claimants. The question then is, *can the United States by an act passed in 1906 divest the claimants of their title to these moneys, and transfer that title to the United States?* Does this differ in any way from a case where A has the money of B, and an act is passed by the legislature transferring the title to that money from B to A? Is not that the precise situation here and is not the present act just the act supposed and equally in violation of the Constitution? Or take the case of the *United States vs. Lee*, cited in our brief, 106 U. S., where the agents of the United States took possession of certain real estate. The Court held that the United States could not divest the owner of the real estate of his title and that Congress could not transfer the title from the owner. Now, it is said—and logically it is the only position which the government can take in this case—it was stated here by Mr. Van Orsdel in his argument and it is stated in the Attorney-General's brief, p. 63, that our money can be taken from us because in the year 1906 Congress had the power to impose a tax upon our clients for having brought merchandise from New York to Manila during the years 1899, 1900 and 1901; in other words, that Congress can impose a tax retroactively. That is the only position which the government can take in this case, logically, for the fact that the money is in the possession of the United States cannot make any difference as to the power of Congress to tax us, and Congress cannot tax us and deprive us of this money because the money is in the possession of the United States any more than it could if the money were in our possession. The very foundation of our claim is that *this money is ours.* The United States has our money, and we have the right to sue

for its recovery. What possible difference can it make as to the power of Congress, whether the United States has the money in its possession or whether the money is in our possession ? ✕

The position of the government then is, that Congress at this time can impose a tax upon a transaction that occurred six years ago. Let us see for a moment, on what this tax is imposed.

MR. JUSTICE WHITE : I do not know that the case is applicable, but there is a case I have in mind. It would not be claimed that Congress could impose an internal revenue tax on tobacco sold ten years ago. That is clear, I take it. There is a case where under the existing law there is only a tax on the manufacture of tobacco, and the tobacco had been manufactured and all the processes upon which the tax was laid were completed. Yet Congress passed a law increasing the tax on manufactured tobacco.

MR. WARD : Exactly.

MR. JUSTICE WHITE : And this Court held in view of the fact that that tobacco was in warehouse, and that it could reach it in that way, that that tax was valid. Now why, if there was an existing tax and your money was there, taken as a result of that tax, isn't it a different thing from imposing a tax when you cannot get at the property, or get at the result in any way, because it is gone before the law is passed?

MR. WARD : Because in this case *there never was any tax at all.* This Court has decided in the first decision in the Lincoln case (197 U. S., 419), and affirmed it in the second decision (202 U. S., 484), that there was never any tax here at all. It is simply a case where the United States has in its possession three and one-half million dollars belonging to these claimants, and that is the law of this case.

I am familiar with that case which your Honor has cited. It brings out a distinction that I had in mind.

MR. JUSTICE HOLMES : Can you give me the name of the case ?

MR. WARD : It is Patton vs. Brady (184 U. S., 608,

✕ See also cases cited 202 U.S. 486-487

623). The tobacco had been taxed once under the internal revenue tax. Upon what was that tax on tobacco levied? It was an excise, a consumption tax. That is, it was a tax upon a luxury that is used, just as is the tax on spirits, or wine, or any other article of luxury or consumption. It is not a direct tax on the tobacco. It is an excise tax. Here is the tobacco in the warehouse, and it has never been used. The legislature of course can continue to impose a tax upon the use of it until it has been used, and it has passed into the mass of general property in the country.

MR. JUSTICE WHITE: Do you insist that the tax is upon its use? Suppose it is burned, or never is used, can the tax be recovered? Suppose it never is used, and it is there for one hundred years. It is a tax on the manufacture, not on the use.

MR. WARD: I had always supposed that it was a tax on the use.

MR. JUSTICE WHITE: Suppose it has been put in the warehouse and cannot be used? Can you recover the tax? You ought to, if it is a tax on the use.

MR. WARD: It undoubtedly should be recoverable in such a case. If that excise tax had been levied plainly and unmistakably on the manufacture of tobacco that would be a different question, but I do not think it was. I think it was an excise tax upon the consumption or use of the tobacco, just like an excise tax on spirits, or other commodities, which are articles of luxury.

MR. JUSTICE WHITE: The argument in the Patton case was that if it was a tax on manufacture, the manufacture having been completed, then to attempt to retax it would be taxing it as property and imposing a direct—and putting a further tax upon it—was to put a direct tax upon it, and therefore the tax was void. That was the argument.

MR. WARD: I am very sure that the Court did not decide the case upon the proposition that the tax was levied retroactively upon something that had been done in the past.

MR. JUSTICE HOLMES: I suppose it would be admitted that a tax could be levied retroactively for something done in the past, if you could get at the property. For instance, a tax for the construction of a street built last year, at the time there was no tax then outstanding. Suppose that a year after an import, it happens that some tea or something else is in the hands of the government and can be got at, what objection is there to another application of the same principle.

MR. WARD: To my mind it is exactly this. In the one case there is a direct tax on property. In this case which we were discussing, in the Oregon case, the tax was levied by a municipal body on real property. It was an assessment upon property for the laying out of a highway. The property was always there, the highway was there and the property had gotten the benefit of it and the legislature at the time it ratified it, if it did ratify it in that case, could have imposed the tax directly on the property. It was not a tax upon the use of the property; it was not a tax upon importation nor upon sale, nor upon anything that had been done in the past or completed; but it was a tax upon property right there. The tax in this case is levied upon the act of importing—I will say importing, though it is not technically correct,—but we will say upon importing goods from New York into Manila. The tax is not laid on the goods themselves but on the act of importing them, and that act of importing was completed four or five years before the law was passed.

MR. JUSTICE BREWER: Does that in any way resemble the succession tax, a charge upon the transfer of property by death?

MR. WARD: I think it resembles it very closely, indeed, and there the state Court of Appeals in New York held that where a will, which took effect before the succession tax law was passed, created a vested remainder, and that remainder vested in enjoyment after the passage of the act, and was expressly taxed in the language of the act, in such a case the tax was imposed

upon a transfer which took place before the act was passed, and the legislature could not tax it because it would be taxation without due process of law. This was held squarely in the Matter of Pell. It was then held subsequently that the same rule applies to a contingent as to a vested remainder, and in the cases where the power of the legislature to tax the transfers of remainders has been sustained, have all been cases where a power of appointment has been exercised and the transfer has taken place by virtue of the exercise of the power subsequently to the passage of the act.

MR. JUSTICE BREWER: The constitutional requirement is that a tax on property should be assessed and collected year by year, and it could be done for as many years as the property was there. But suppose personal property is here today, subject to a tax, and tomorrow is removed to a foreign country. Does the government have the power to put the tax on that property after it has passed outside of the jurisdiction?

MR. WARD: I would have very serious doubt of whether it could (see *Kentucky vs. Union Transit Co.*).

MR. JUSTICE BREWER: Even when the transfer by succession is completed, or the act of importation—you would put that upon the same ground, that the thing was finished?

MR. WARD: Exactly; the thing has been done. If due process requires that before a tax can be levied and assessed directly upon property the tax-payers shall have the opportunity for a hearing, how much more must it require that a tax upon an act, an act of importation, or any other act, must be levied *before the act is performed*, because otherwise we would have no due process of law. We have no opportunity of declining to do the act on the condition imposed. Where the tax is laid before the act is done, the tax-payer has opportunity to escape it. But in a case such as this he has no chance at all. If Congress can do this now, why can it not, as your Honors suggest, impose a tax on articles now on the free list, articles which

have been imported under the free list for the past ten years?

MR. JUSTICE DAY: Do you claim that your position is analogous to the Pell case where the estate was fully vested?

MR. WARD. I think it is exactly analogous to that. In the Pell case, the testator made a will in 1870 by which he created a vested remainder. The life estate terminated after the act imposing taxes on remainders took effect, and the act of the legislature—

MR. JUSTICE DAY: Assessed a tax upon entering into possession?

MR. WARD. Yes, and the court of appeals said there the transfer took place at the time the testator died, and not at the time possession was entered into, and therefore could not be taxed.

MR. JUSTICE BREWER: Take the license tax for selling liquor. The tax is fixed at a certain rate for a year. The tax is paid, and the year is passed. Can the government turn around afterward and say, we will now charge you as a license for that which is already completed double that which you have already paid?

MR. WARD: I think not. I think if the tax is on the act of selling, you cannot tax a sale which is in the past. If it is on the liquor, which remains in a man's possession, it is a different question.

Again this act might be called, as we have said in our brief, the imposition of a penalty for doing an act innocent when done. Here our clients do an act which at the time they have a right to do, without paying any tax or penalty—that is, to bring goods from New York to Manila. In 1906 Congress steps in and says all this money which is taken from you is confiscated under the guise of ratifying a tax. It simply amounts to a penalty, to a punishment. The point which I am making has been illustrated by this Court in two or three cases cited in our brief. In the Burgess case, 97 U. S., the Court held that an act of Congress should not be construed to take effect at a certain time because if it did so, it would impose a tax retroactively

upon a number of things. I think in that case it was a tax on tobacco which had been removed from the warehouse before the law was passed, on the very day the law was passed, but before it had received the signature of the President. This Court said that this law cannot have taken effect at the very first instant of that day, it must be deemed to take effect from the moment it was signed, because otherwise it would impose a tax retroactively.

MR. JUSTICE BREWER: In this case would there be any lack of power on the part of the government to tax at the time of the importation, and if there was no lack of power, does it not make the effort a simple form, an informality in the proceeding—

MR. WARD: Not at all, your Honor. It is true that this Court has held in the second Dooley case (183 U. S., 151), that Congress has the power to impose a duty on goods shipped from New York into Porto Rico and by analogy into the Philippines, to impose such a tax prospectively; but at the time this tax was collected from us there was no act of Congress in force, and this Court held expressly in the first Dooley case that the President did not have the power to collect these duties, his officer was a mere trespasser, and he took our money. There was no question of irregularity. It is a question of the absolute lack of power and jurisdiction.

MR. JUSTICE WHITE: Not the lack of jurisdiction of the United States?

MR. WARD: The lack of jurisdiction on the part of the executive officer.

MR. JUSTICE WHITE: But then the executive officer acting under color of authority, but without legal authority, did the act. Now Congress comes in, and it is admitted that Congress would have had full power to authorize him to do that act. He did the act without authority. Congress comes along and says, I approve the act of the officer, and give it my sanction retroactively. You say that must be treated just as if no act had ever been done?

MR. WARD: Just as if no money had ever been collected. That is the position taken by the government in this case, and I think logically they are driven into it, and I do not see any escape from that position. Because the money remained ours all of the time. If it was not ours we had no right to bring the action, and no right to bring the action in the Warner Barnes case or the Dooley case. This was our money collected by men who had no right whatsoever to take it away from us, mere trespassers.

Now a word with regard to the decision in the case of *Hamilton vs. Dillin* (21 Wall, 73). This was the case discussed rather briefly by my associate, but I would like to go into it at some length, because, as Mr. Justice HOLMES said, this Court said in the second decision of the Lincoln case in the 202, U. S., that even if Congress has the power, "see Hamilton vs. Dillin, etc." Our contention is that Hamilton vs. Dillin is absolutely no authority whatsoever for holding that Congress can ratify an illegal collection of duties or taxes retroactively. In Hamilton vs. Dillin by an act of Congress of 1861 the President was authorized to regulate commercial intercourse with the insurgent states, and it was provided that such commercial intercourse should be had in pursuance of rules and regulations to be prescribed by the Secretary of the Treasury. Now, this act of 1861 did not prescribe any rules and regulations whatsoever, but left them to be prescribed by the executive. The Secretary of the Treasury established these rules and regulations which provided among other things that on purchases of cotton and transporting the same to a loyal state, four cents a pound should be paid. Hamilton desired to engage in this traffic, it was unauthorized, illicit traffic, which he had no right to engage in except upon permission; he applied for a license, paid the license fee of four cents a pound—bought cotton in the insurrectionary states and then sued the collector, Dillin, to recover the license fee. There had been a regular machinery established. He sued the man to whom

he had paid the license fee for its recovery. In the meantime until 1864, the money was simply held, so far as appears from the case, but without being paid into the Treasury of the United States—apparently held by the Secretary of the Treasury or the Secretary of War, but not paid into the Treasury of the United States. In 1864 Congress passed an act providing that all moneys collected from these license fees should be paid into the Treasury of the United States. This Court held in that suit in the first place that the President had the power, without any act of Congress authorizing him, to impose this license upon trade with the insurrectionary states, that it was a necessary incident to the war power ; and it held secondly, that the act of Congress expressly authorized him to do this, and that act of Congress was passed, not under the power to lay taxes, duties, imposts and excises, but under the war power of the nation. Then it says at the conclusion of the case that the act of July 2, 1864 recognized and confirmed the regulations, etc.

But the distinguished counsel who argued that case, among whom were Mr. William M. Evarts and Mr. Lincoln, did not make any point as to the power of Congress to ratify, and this Court did not cite a case upon that proposition. It seems to me therefore that what this Court meant was that it was the establishing of a license fee at the rate of four cents a pound on cotton purchased in licensed trade with the public enemy which was authorized and approved by Congress, as there might have been some question as to whether the secretary had acted in conformity with the act of authorization. Certainly, *Hamilton vs. Dillin* is not an authority directly in point upon the power of Congress to ratify the exaction of moneys by the Executive without warrant of law.

Mr. Van Orsdel in his argument cited another case, *Stockdale vs. Insurance Companies* (20 Wall., 323). We have referred to it briefly in our brief, but while we are discussing this point, I would like to refer to it

and bring the point I have in mind directly before the Court. In *Stockdale vs.* the *Insurance Companies*, a tax had been levied by the collector of internal revenue upon these companies under the income tax law of 1864. That law by section 116 imposed a tax on individual incomes, and by sections 120, 121 and 122 it imposed a tax upon dividends and interest paid by certain corporations. It was provided that when the individual made his return on his income, he was not required to make any return on the tax paid on the dividends or interest which he had received from corporations which had paid the tax. Now, by an Act of 1867, it was provided that section 119 of the Act of 1864 should be amended so that the income tax should be in force until December 31, 1869, and no longer. On July 14, 1870, an act was passed by which it was provided that sections 120, 121 and 122 of the Act of 1864, by which this tax on the earnings of corporations was imposed, should be construed to be in force until the first day of August, 1870; so that the question which was before the Court, as clearly appears from some later cases in which this case was cited, was whether the Act of 1867 which limited the duration of the income tax to the 31st of December, 1869, applied to the personal income tax and to the tax on dividends and earnings of corporations as well, or whether it applied only to personal incomes. Now, in *Stockdale vs. Insurance Companies* it was held that it applied only to personal incomes, and that but for the Act of 1867 the tax on the earnings of corporations would have been in force indefinitely; that it was a limitation on the period for which that tax should be in force, not a re-enactment and revival of a tax which had expired in 1869. The dividends, etc., on which the taxes were imposed in Stockdale vs. Insurance Companies were declared and paid in 1870 before this act took effect, and it was claimed that the act was retroactive. The real ground on which that case was decided must have been that Section 119 as amended in 1867 did not ap-

ply to the tax on corporation earnings, because in a subsequent case which I have not cited in my brief, but one to which I would like to call the attention of the Court, the case of *Erskine vs. Milwaukee and St. Paul Railway Company*, 94 U. S., 619,—(and I would like to cite it in connection with our argument at page 37 of the brief, in which we refer to the Stockdale case.) The Stockdale case has been cited here by the government as an authority for the proposition that Congress can impose a tax retroactively, because it is claimed that the act of 1864 expired in 1869, and it had been revived in July, 1870, so as to impose a tax upon dividends declared and paid between December 31, 1869 and July 14, 1870. But in this *Erskine* case the question that was before the court was whether *a penalty* could be collected from a railway company for failure to make the return which was required by the act of 1864 on its dividends, and interest, on which the tax was imposed by the 120th, 121st and 122d sections of that act. The Court held in a very brief opinion of only about half a page, in which it cited *Barnes vs. Railroad Companies* and *Stockdale vs. Insurance Companies*, that the penalty of one thousand dollars could be imposed and collected from the railroad company. Now, obviously, if that law imposing a penalty for a failure to make a return had expired with the year 1869, Congress could not on the 14th of July, 1870, re-impose a penalty and collect it as was done in that case in 1871, because such imposition of a penalty would clearly have been an *ex post facto law ;* and as Stockdale against the insurance company is cited as the basis of the *Erskine* decision, the conclusion is irresistible that Stockdale vs. the Insurance Companies is an authority upon the construction of the Act of 1870, and of the income tax law of 1864, and not an authority for holding that a tax can be imposed retroactively.

Now a word with regard to the case of *De Lima vs Bidwell*, and what was decided in that case upon the

power of Congress to ratify. That question went to the very root of the plaintiff's right to recover judgment against Bidwell. If Congress had the power to ratify the collection of those duties on the imports from Porto Rico, then the plaintiff clearly was not entitled to judgment. The Act of March 24, 1900, was, it seems to me, the strongest ratification of the collection of those duties—the appropriation of the moneys collected. Complete ratification by actual appropriation was the natural intent and meaning of the act. This Court gave it the construction in that case that it did not apply to the De Lima case, and to other cases where duties had been paid under protest and suit brought for their recovery, because it held that Congress had not the power constitutionally to impose such a tax. The question of the power lay at the very root of the right to maintain the action, and the Court decided in a perfectly clear and unequivocal opinion that after suit had been brought against the collector for recovery of such a tax Congress could not impose it, and that was one of the distinct grounds upon which that decision was based. In fact, it was the most important ground, because if the tax had been ratified, then the entire discussion of whether Porto Rico was a foreign country and all that was entirely unnecessary to the case.

We have made it a point in our brief, and it seems to me that is entirely in line with the general principles on which our government is framed, and it is illustrated by Chief Justice MARSHALL in Fletcher vs. Peck, that where a state or the United States is liable upon a contract, whether the contract is expressed or implied—and in this case it is an implied contract on which it is liable to the claimants—and the case is brought into court and the government lays its court open to the claimants, creates a court for the purpose of adjudicating these claims, Congress cannot say that they now repudiate the claim, they cannot pass a law absolving it from the obligation of that contract. The illustration which Chief Justice MAR-

SHALL made your Honors will find at page 62 of our brief.

Just a word more with regard to the situation in the Philippines and how these taxes were imposed and all that has been said in regard to the expenditure of these taxes for the maintenance of government and all that. This law—Your Honors will recall we made a point of it in the case of Warner Barnes,—this Court decided the Insular Cases in May, 1901. Immediately after that decision was handed down, Mr. Secretary Root cabled Mr. Taft that the Court had not yet decided the status of the Philippine Islands, and, therefore, to continue the collection of duties on imports from the United States. Your Honors did not decide the case of the Fourteen Diamond Rings, by which the status of the Philippine Islands was determined, until December, 1901, and the collection of this tax expired November 15, 1901, so that until the law was settled by this Court it could not be told whether the government had the power to collect the taxes or not.

Every one of these cases was submitted to this Court by the Attorney-General in the Warner Barnes case. How can Heinszen and Company and all these other claimants be deprived of the rights to recover these duties, because their cases were not on the docket? The Warner Barnes case was brought up here regularly. The Attorney-General submitted a statement in this Court, of claims filed amounting to three and a half million dollars, and in that statement he specified every one of these cases, including the case before the Court, and said that these cases all depended upon your Honors' judgment in that case. They were all before the Court just exactly as much as if they had all been on the docket, and should now be regarded as if in every one of them we had entered judgment on the 8th of June, 1906.

Before closing I wish to state that I have now before me the case of Patton vs. Brady, and as so much has been made of that case as to whether the tax was laid on the manufacture or the sale of the tobacco, I

would like to read from that case to your Honors. It is in the 184th U. S., page 608, and I am reading from page 623.

(Counsel read at length to the Court.)

MR. JUSTICE WHITE. It is upon the act of sale, not the consumption.

MR. WARD. Well, the act of sale. The sale had not taken place.

MR. JUSTICE WHITE. I agree to that. It was not on the use of the tobacco.

MR. WARD. Oh, I did not mean the act of smoking it. I thank your Honors very much for your attention.

Office Supreme Court, U. S.
FILED.
APR 8 1907
JAMES H. McKENNEY,
Clerk.

FILE COPY.

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 580.

THE UNITED STATES, *Appellant*,

v.

CONRAD HEINSZEN and GUSTAV BROCKMANN, trading as Partners under the Firm Name of C. HEINSZEN & CO.

BRIEF

Filed for Certain Claimants Having Interests Similar to those of Appellees.

HILARY A. HERBERT,
BENJAMIN MICOU,
Counsel.

IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
CONRAD HEINSZEN and GUSTAVE BROCKMANN, trading as Partners under the firm name of C. HEINSZEN, *Appellees.*
} No. 580.

BRIEF

of Herbert & Micou, — representing Certain Claimants having Interests Similar to those of Appellee.

Statement.

This is an action for the recovery of payments made for the admission of goods from the United States into the Philippine Islands between May 13, 1899, and November 9, 1901, to which the Government filed a demurrer and the Court of Claims January 7, 1907, rendered an opinion overruling said demurrer. Whereupon the Government answered the petition of claimant, the claim was submitted and upon an agreed statement of facts judgment was awarded for the claimant against the United States for the amount claimed, $16,827.31, whereupon the United States appealed the case to this court.

Questions Raised.

The questions raised and contended for by the Government in the court below were:

1. Is the Government a proper party defendant?
2. Do the allegations of the petition negative a voluntary payment?
3. Did the validating act of June 30, 1906, legalize the collection of the duties of which the claimant complains?

Discussing these in their order—

1. Is the Government a proper party defendant?

This question was pressed by the Assistant Attorney-General orally and by briefs, at considerable length in the court below, but the following fact, well known to this court, fully answers all the arguments of the Government, viz:

The payments for which suit was brought were exacted by the United States and the money used by them.

This material fact is in no way affected from the United States having chosen to use these moneys in meeting expenses of governing the Philippine Islands, or Congress, by Section 4 of the Act of March 8, 1902, long after the payments had been exacted, having provided:

> "That the duties and taxes collected in the Philippine Archipelago * * * shall be held as a separate fund and paid into the Treasury of the Philippine Islands, to be used and expended for the government and benefit of said islands."

In the brief of the Government before this court, just to hand, there is no discussion of the United States not being a proper party defendant, and we presume the contention is abandoned.

2. Do the allegations of the petition negative a voluntary payment?

In the number of times the question of a refund of payments collected in Porto Rico and the Philippines between the ratification of the treaty of peace and the enactment of a tariff law by Congress itself for the two islands respectively has been before this court it is hardly to be assumed that this question escaped consideration. Yet counsel for the Government press with seeming seriousness their contention that the payment in this case was voluntary. We have no doubt, though, that the court considers that the case of *Swift* v. *United States*, 111 U. S. 22, is conclusive of the question. In the brief just filed by the Government, pp. 29–31, it is contended that the *Swift* case has no application here, and it is stated, to differentiate the *Swift* case from the present one, that in that case there was an express contract; that there was a running account between the Swift Company and the Government; and that the language used by the court in the *Swift* case is general and not material to the grounds upon which the case was decided.

As to the question of there having been an express contract and a running account, we can see no bearing whatever that those facts can have upon any dissimilarity of principle between the two cases. There was certainly a contract here to pay back these duties, and a contract is a contract, equally binding whether it be express or implied. The bearing of there having been a running account, if such was the case, we are unable to see. What is stated in the opinion is as follows:

> "It must be admitted that the course of dealing and periodical settlements between the parties, *whether the accounts be regarded as running merely or stated*, shows clearly enough that the business was conducted upon the basis, that the claimant was

> to receive his commissions in stamps at their par value, and not in money, and that this was asserted by the Internal Revenue Bureau and accepted by the appellant."

In other words, what is said is merely to show the compulsion which the Swift Company was under from the Internal Revenue Bureau with whom it was dealing.

As to the language used by the court in the *Swift* case not being material to the grounds upon which the case was decided, as we read the case, it was absolutely material. The language was used in connection with the decision of the very point at issue, viz., whether the failure to make a protest at the time the taxes were exacted barred the right of action being brought to recover back taxes illegally exacted; and the court held that it did not bar such action.

If this point now being pressed so strenuously escaped the ingenuity of the many able counsel who first and last have represented the Government since the commencement of the Insular Cases, it must have been because the exigencies of desperation have not hitherto been so great as now. Of one thing we feel sure: The point, if sound, would not have escaped that attentiveness which the members of the court have, individually and collectively, given to these cases.

3. Did the validating act of June 30, 1906, legalize the collection of the duties of which the claimant complains?

Our contention is that this act did not validate the exaction or legalize the collection of these so-called duties, because

CONGRESS COULD NOT CONSTITUTIONALLY VALIDATE OR LEGALIZE THESE COLLECTIONS.

Without quoting from authorities with which the court is perfectly familiar, the *Dooley* case, 182 U. S. 235, the

Warner Barnes case, 197 U. S. 428, and the same case on the application for rehearing, 202 U. S. 484, settle that the President's authority, as Commander-in-Chief, to exact duties in the Philippine Islands upon imports from the United States, ceased with the ratification of the treaty of peace, and that right to free entry of such goods then began and continued until Congress passed a tariff law for the Philippines.

This statute makes it the law of this case that the action of the authorities in levying these payments was at the time of exaction *ipso facto* void, and without color of law; and the right of the claimant to recover for such collections immediately vested and became at once complete and perfect in every respect.

Such right of action was property of the claimant, just as much so as money in bank, or land to which he had a fee simple title, and could not be taken from him by legislative fiat.

> "This right to bring an action of law, in other words, a legal chose of action, constitutes a valuable kind of personal property."
>
> Darlington on Personal Property, 107.

This court has held that a right of action was property. *Angele* v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 138.

At the time of the passage of the act of June 30, 1906, suit had already been brought on this chose in action. The act is as follows:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March 8, 1902, at all ports and places in said Islands upon goods, wares, and merchandise imported into said Islands from the United States or from foreign countries, or exported from said Islands, are hereby legalized and ratified,

and the collection of all such duties prior to March 8, 1902, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by the power of Congress been specially authorized and directed."

This act, so far as it expresses intent to validate the collection of the money here sued for, is unconstitutional, because

1. It deprives claimant of his property without due process of law, and appropriates his property to public use without just compensation, in violation of the Fifth Amendment to the Constitution, and violates Section 1, Art. III, of the Constitution, which provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.

The decision of the Court of Claims (p. 17, Rec.), refers to two classes of cases between which exists a clear distinction, generally recognized and fundamental, viz:

(1). A class where is presented the curative force of statutes applicable to the failure to comply with the provisions of law relating to the assessment and collection of the tax, but where the tax itself is not fundamentally illegal.

In this class of cases the curative act is valid. Then,

(2). A class where is involved the right of a legislative department to cure an entire want of authority of the tax executor to act at all. In other words, by retrospection to create a tax which was not a tax before.

Where attempt is made to cure the entire want of authority the act is invariably declared invalid.

The legislation under consideration as a curative act falls clearly within the second class.

In the present case there was entire want of authority of the tax executor to act at all, both because the President had no power to impose such duties, and goods coming from the United States to the Philippines were not subject to any duty at that time.

What this legislation proposes is to retrospectively create a tax where no tax had previously existed.

These moneys, at the time the provision in question was enacted, were wrongfully in the Treasury and the right to their recovery was the property of the claimant, suit for the enforcement of which had been brought and pending some four years, and claimant's right to recover in this class of cases had by a test case been adjudicated by this court favorably to him.

Under these circumstances, Congress could not legalize and ratify the wrongful taking and holding by the United States of this claimant's property. If it could, then claimant's property could be taken without due process of law and appropriated to public use without just compensation, and the legislature could exercise the powers vested by the Constitution exclusively in the Judiciary.

In one of the earliest cases decided by this court it is said:

> "There are certain vital principles in our free *Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of legislative power; as to authorize *manifest injustice by positive law;* or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. An Act of the legislature (for I can not call it a law) contrary to the *great first principles* of the *social compact*, can not be considered a *rightful exercise* of legislative authority. The obligation of a law in governments established

on *express compact and republican principles*, must be determined by the *nature* of the *power*, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *judge in his own cause;* or a law that takes *property* from A. and gives it to B. It is against all reason and justice, for a people to entrust the legislature with such powers; and therefore, it can not be presumed that they have done it. The *genius*, the *nature* and the *spirit* of our State Governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason forbid them.* The legislature may enjoin, permit, forbid, and punish; they may declare *new* crimes; and establish rules of conduct for all its citizens in *future* cases; they may *command* what is right, and *prohibit* what is wrong; but they can not change *innocence* into *guilt;* or punish *innocence* as a *crime;* or violate the right of an antecedent *lawful private contract;* or the *right of private property.* To maintain that our Federal, or State, Legislature possesses *such* powers, if they had not been expressly restrained, would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments.*"

Calder v. *Bull*, 3 Dall. (U. S.) 388, 389.

Mr. Justice Harlan has said:

"It is contended that the foregoing enactments govern the present case and preclude recovery of interest upon the amount of the respective coupons from their respective maturities. In this view we do not concur. By the first section of the Act of 1868 the Legislature assumed to declare what was the true intent and meaning of the previous legislation prescribing and limiting the rate of interest. It was said by *Chancellor* Walworth, in *Salters* v. *Tobias*, 3 Paige 344, that, 'in England, where there is no constitutional limit to the powers of Parliament, a declar-

atory law forms a new rule of decision and is valid and binding upon the courts, not only as to cases which may subsequently occur but also as to pre-existing and vested rights. But even then the court will not give it a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to preexisting laws. Courts will treat such laws with all the respect that is due to them as the expression of the opinion of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied that the legislative construction is wrong, he is bound to disregard it.' When counsel, in *Ogden* v. *Blackledge*, 2 Cranch 276, announced that, to declare what the law is or has been is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted with the observation that it was unnecessary to argue that point. Prior to the passage of the Act of 1868, the highest judicial tribunal of the State had adjudged that when a sum was to be paid at a specified time, as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law *in that class of cases.* And the utmost effect to be given to a subsequent legislative declaration, as to what was the meaning of the statutes which had thus been the subject of judicial construction, would be to disregard it as an alteration of the existing law in its application as to future transactions, especially where, as was the case in the Act of 1868, that declaration was accompanied by a distinct provision, in terms, changing the preexisting law.

"In *Stockdale* v. *Ins. Co.*, 20 Wall., 331 (87 U. S., XXII, 351), this court, speaking by *Mr. Justice Miller*, said that, 'Both on principle and authority it may be taken to be true, that a legislative body may, by statute, declare the construction of previous statutes so as to bind courts in reference to all transactions occurring after the passage of the law, and may in many cases, thus furnish the rule to govern the courts in transactions that are past, provided no constitutional right of the party concerned is violated.' *Sedgwick* Stat. and Constitutional Law, 2d ed., pp. 214, 227; Cooley, Const. Lim., 93, 94. It is clear, therefore, that neither the Act of 1868, nor the provision quoted from the revision of 1872, which is but a continuation of the 2d section of the Act of 1868, can be deemed applicable to the case before us. The contract between the Town and the holders of its securities was entered into prior to these enactments, and the rights of the parties must, necessarily, be determined by the law as it was when the contract was made. It was not within the Constitutional power of the Legislature to take from the plaintiff his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right under the law of the State."

Koshkonong v. *Burton*, 104 U. S. 668.

What is said here is directly applicable to the present case. There had been an adjudication as to what was the law in this class of cases before the attempted ratification. The plaintiff had rights arising out of an implied contract on the part of the Government to refund him these payments illegally exacted which it is not within the constitutional power of the legislature to take from him.

It seems to us too plain to require the reciting of further authorities, that the result of the act here being construed would be to take the claimant's property and give it to the United States, and to do this by a legislative fiat.

There are, however, many authorities upon this subject directly in point and from various sources which show how universally, though respectfully, the courts of the country have withstood the encroachment of the legislature upon their powers, when that encroachment has been made plain, and we will, even at the risk of being tedious, quote from some of the most pointed of these cases.

"If it was competent for the Legislature to make a void proceeding valid, then it has been done in this case. Upon this question we can not for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree, in this case, the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants by the will are taken from them, and given to others, according to our statutes of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings, upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies, which before belonged to the legatees, have now ceased to be theirs, and this result has been brought about by this legislative act alone. The effect of the act upon them is precisely the same as if it had declared, in direct terms, that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs at law of the testator, according to our law of descent. This it will not be pretended that they could do directly,

and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law."

McDaniel et al. v. *Correll et al.* 19 Ill. 227, 228.

"Nor can the Act of Assembly of April 6th, 1870, Pamph. L. 960, entitled 'An Act to validate certain proceedings in partition,' have any effect upon the title of Lewis Richards. Without pausing to inquire into the soundness of the objection which has been made to the title, as not being in accordance with the constitutional provision which requires that 'the subject shall be clearly expressed in the title' (first amendment of 1864), we hold that the act itself is unconstitutional, and void, as an infringement of the inhibition contained in the 9th Section of the declaration of rights, Art. IX, of the Constitution, that no person 'can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.' What is this act but a mere bald attempt to take the property of A. and give it to B.? At the date of the passage of the act, Lewis Richards had an undivided share—a fourth part of the land in question—and by the legislative fiat validating these proceedings in partition, which the law then pronounced a nullity as far as his estate was concerned, this undivided share is divested from Lewis Richards and vested in Griffin Rote, who figured as a trustee in the partition. * * * It was not a case in which the mere irregularity of a judgment or a formal defect in the acknowledgment of a deed was cured, where the equity of the party is complete and all that is wanting is legal form. Such were *Underwood* v. *Lilly*, 10 S. & R. 97; *Tate* v. *Stooltzfoos*, 16 S. & R. 35; *Satterlee* v. *Matthewson*, 16 S. & R. 191; and *Mercer* v. *Watson*, 1 Watts, 330. On the contrary, it is very clearly within the principle of *Norman* v. *Heist*, 5 W. & S. 171; *Greenough* v. *Greenough*, 1 Jones, 489; *De Chastellux* v. *Fairchild*, 3 Harris, 18; *Werges* v. *Dentler*, 9 Casey, 495; *Bagg's Appeal*, 7 Wright, 512; *Schaffer* v. *Erea*, 4 P. T. Smith,

304; *Shark* v. *Brown*, 11 P. T. Smith, 320. These cases abundantly sustain the position that an act of the Legislature can not take the property of one man and give it to another, and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the Legislature to infuse life into that which is dead, to give effect to a mere nullity. That would be essentially a judicial act, to pronounce judgment—to usurp the province of the judiciary—to forestall or reverse their decision."
Richards v. *Rote*, 68 Penn. St. 255–256.

"As we have seen, the order of the Probate Court directing the sale by Forster and the sale of the 19th of September, 1853 were *void*. If prior to the enactment of April 2, 1866, the validity of the sale in question had been presented to this court, even in a collateral proceeding, we must have held, both upon reason and authority, that it transferred to the purchaser no estate in the land. Had the District and Supreme Court in fact decided the sale by Forster to be void, and the Legislature had then enacted that the judgment should be set aside, and the validity of such sale again be made the subject of judicial inquiry, the interference by the Legislature with a distinct department of the government would be palpably apparent to every mind. In every case, and the instances are few in which such a law has been passed upon by the courts of a State having a written constitution, it has been declared unconstitutional; even where there was in the written constitution no express provision prohibiting the Legislature from exercising judicial power. But had the Legislature gone one step further, and by special enactment or by general law covering the case, commanded the courts which had rendered a judgment in favor of a plaintiff, in an action based on the invalidity of the Forster sale, to set it aside and to enter a judgment for the defendant, such arbitrary attempt would, at once, have been recognized as an

abuse not to be tolerated under our free constitution of Government.

"The circumstance that the validity of this very order of sale had never been before the courts, does not make the statute (assuming that it applies to such order) any the less an effort summarily to dispose of a question purely judicial, or to deprive citizens of their property 'without due process of law.' This last expression is the equivalent of the 'law of the land'; a law which, as said by Mr. Webster in the *Dartmouth College* case, 'hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'

"If we assume the act to have validated the Forster sale (and order of sale), then the lands which up to the date of the act—April 2, 1866—belonged to the heirs of Nathaniel M. Pryor, from that date became the property of other persons, and this transfer was accomplished by the legislative act alone. And, even if we could indulge the fiction that the parties to be deprived of their estates had notice of the intended act, and a hearing and opportunity to produce witnesses, or to show cause why the act should, not be passed, this would have been a species of trial, and the exercise of judicial power by the Legislature."

Pryor v. *Downey*, 50 Cal. 405–406.

"Could it, by statute, give vitality to the decree of a court which was absolutely lifeless and void for want of jurisdiction over the person against whom it was rendered?

"The Legislature may, by statute, validate judicial proceedings, when the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their *substantial rights*. But it can not, by retrospective legislation, give validity to previous judicial proceedings which were void for want of jurisdiction over the parties. Two reasons may be assigned for this inhibition: *First* because it would be an exercise of judicial power not contem-

plated by our Constitution—see Art. III; *second* because it would operate to deprive parties of their 'day in court'; property rights might be divested without notice to those interested, and without giving them the opportunity to be heard. See § 25, Bill of Rights; *Mason* v. *Eldred*, 6 Wallace, 239; Cooley on Const. Lim. § 107, and cases cited in notes. * * * If it was competent for the Legislature to make this declaration, then it was competent for it to have declared that to be a judgment which before was no judgment, and binding upon the party against whom it was rendered when before he was not bound at all; for such is the direct result. It is a proposition not to be discussed at this day, that the Legislature has no such power. *Nelson* v. *Rountree*, 23 Wis. 370; See *Pryor* v. *Downey*, 50 Cal. 403; Wade on Retroactive Laws, § 164."

Israel v. *Arthur, Adm'r, et al.* 7 Colo. 10–11.

The above cases are where the legislature attempted by retroactive language to instill life into judicial proceedings which the courts had held were void when such proceedings were had. In principle they are equally applicable to an effort of the legislature by retrospective language to instill life into executive action that the courts had already declared void at the time such action was had.

Running through all the decisions on this subject is the broad idea that *Mr. Justice Harlan* gave concrete expression to in the citation already quoted from *Koshkonong* v. *Burton*, 104 U. S. 668., *ie.*, that settlement by a court of the law applicable to a class of cases in one case is a settlement as to the whole class, and precludes the legislature from infringing upon the vested powers of the Judiciary and changing by a legislative enactment the decision of the court so as to deprive persons of property rights who are in a class where their rights had already been determined by a test case.

"On May 6, 1878, the legislature passed a statute, to take immediate effect, in these words: 'No sale thereinafter made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words "or such undivided portions thereof as may be necessary," or the words "or such undivided portions of them as may be necessary:"' provided, however, that this act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the eighth day of February of the current year and before the passage of this act.' St. of 1878, c 229.

"The principal question presented and argued in each of these six cases is whether this statute is constitutional, as applied to sales, no suit involving the validity of which had been commenced before its passage, and where the real estate sold had not been alienated between February 8, 1878, and the passage of the act.

"After mature advisement and careful examination of the numerous cases cited at the bar, and giving due weight to the strong presumption in favor of the validity of every act of the legislative department, all the judges feel themselves compelled by their judicial duty to declare that the statute in question exceeds the constitutional authority of the Legislature in two important respects.

"First. The statute assumes to take away private property, without due process of law, and without compensation.

* * * * * *

"Second. The statute is an attempt to exercise judicial power by the legislature. It does not change the law for the future, nor establish a uniform rule for the past." * * *

Forster v. *Forster*, 129 Mass. Rep., 560–561.

In the decision just quoted from, the act declared unconstitutional had excepted from retrospective operation

all cases where suit had been brought, thereby recognizing the inability of the legislature to reach that class of cases, and the question was, whether the retroactive provision was applicable to cases where suit had not been brought; and the court held even as to those cases it was not applicable. Here it is attempted to legislate retroactively for cases not only in which suit has already been brought, but where it had been determined in a test case that there was a right in this class of cases to recover.

We will now refer to cases where the actions attempted to be validated had to do with the assessment or collection of taxes.

> "It must be recollected that when this case was in review before, it was decided, after solemn argument, that the defendant on the same statement of facts was not entitled to payment for the value of his improvements,— that he had no claim whatever against the plaintiff; it is now argued, that by an omnipotent legislative fiat he has a legal and constitutional right to full compensation. With every respect for that branch of the Government, we must take leave to deny that any such authority as is claimed belongs to the legislative power of the State. Thus, suppose a suit is brought by A. against B., and the court should decide that A. was entitled to nothing, would it be competent for the legislature to interfere, and by the flimsy pretext of giving a construction to a previous act on which the question may depend, on the statute of usury, for example, or to a principle of the common law, which amounts to the same thing, enable A. to recover the full amount of his claim. And yet, stripped of the specious pretenses with which the argument of the defendant's counsel is clothed, it is precisely what is attempted here. It is proposed, by the substitution of legislative will for right, to compel the plaintiff to pay for improvements, when it is clear, so far as judicial determination can make it so, he was not under an obligation, either legal or moral, to do so, before the

passage of the act. In other words, it is seriously contended that the legislature, in the plenitude of their generosity, have transferred the money of the plaintiff into the pocket of the defendant. The furthest the court has gone is in *O'Connor* v. *Warren*, 4 Watts & Serg. 223, where it is held, that until the judiciary has fixed the meaning of a doubtful law, upon which right has become vested, it may be explained by legislative enactment. But in that case it is strongly intimated, if not directly decided, that where the construction is not doubtful, particularly where it has been under judicial cognizance, no subsequent act of the legislature, whether it assumes the form of an explanatory act, or whatever shape it may take, as using the words 'it shall not be construed,' which is now the usual formula, it cannot affect or change previous rights already fixed and settled."

Lambertson et al. v. *Hogan et al.*, 2 Penna. State Rep. 25.

"It is claimed, however, that the curing act of February 28, 1873, entitled 'An act to legalize the tax-roll of the village of Mt. Clemens for the year 1872,' does away with the force of the objection.

"That act does, in terms, purport to heal all the defects which have been pointed out. But plaintiff's judgment was obtained before the justice before this act was passed. It was regular when obtained, it could not be reversed. The legislature have no authority to reverse judgments, directly or indirectly. The effect of the act must be so limited as not to interfere with an existing judgment, or it would be necessary to declare it void on principles which are too elementary to be discussed."

Moser v *White*, 29 Mich. Rep. 60.

"* * * The act of March 25, 1874, referred to in the opinion, in terms validates, ratifies, and confirms all orders and resolutions of the Board of Supervisors, in relation to improving Townsend street, and the resolution of award, and all contracts made

under said orders and resolutions, and all proceedings of said Board of Supervisors of public streets."

Reis v. *Graff*, 51 Cal. Rep. 86.

"The Board of Supervisors not having made an order for the publication of the notice of the award of the contracts, all the proceedings, including the assessment, subsequent to the award, were void. (*Donnelly* v. *Tillman*, 47 Cal., 40; *Donnelly* v. *Marks*, Id., 187). The plaintiff relies upon the act of March 25, 1874 (Stat. 1873–4, p. 589), as not only validating the assessment, but as having a retrospective operation, which necessarily affects this action. The action had been finally submitted for decision before the passage of the act.

"Assuming that the legislature may itself make the assessment, or what amounts to the same thing, validate a void assessment, does the act have the effect to make the assessment valid, by relation, as of the date of the invalidated assessment? Or does it become valid only at the date when the act takes place? The act does not furnish a new rule of evidence, nor does it merely cure irregularities or formal defects in the proceedings or the assessment; but if valid it creates a lien upon property which before the passage of the act was not chargeable with the lien, and gives the contractor and his assigns a cause of action for its enforcement. The assessment, in our opinion, if it became a lien by virtue of the act in question, became such at the date of the passage of the act, and did not take effect, by relation, as of the prior date. There being at the commencement of the action no lien in fact upon the property, and the lien created by the act not taking effect as of a prior date, the action cannot be maintained."

Opinion in *Reis* v. *Graff*, *supra*; p. 90.

The cases we will next cite are peculiarly applicable to attempts to make a law for a particular case between contesting parties contrary to the existing law.

That is what is attempted by the provision under consideration.

The law applicable to this case is the law that governed in the decision of the *Warner Barnes* case, and Congress can not issue a mandate to this court to establish a particular interpretation that will override the one the court adopted in the test suit for this class of cases.

> "But the legislature say the court shall appoint a trustee, to execute the power immediately; that is, makes a law for a particular case between two contesting parties, which rule is contrary to existing law, and orders the court to inforce it. Suppose the right of entry was barred by twenty-one years' adverse possession, and the legislature, choosing to pass a law for a particular case, should enact that A might bring his action of ejectment against B for a messuage or tenement, and in order to give judgment in favor of A, notwithstanding twenty-one years' actual adverse possession, alleging some reason not sufficient in law to prevent the statute from running. Here would be legislation for a particular case, contrary to the general law. Such legislation would, I apprehend, find few approvers, because it would be taking that which the general law made the property of one man and giving it to another. But after all, the excuse would be that they were only giving the estate to him who had the title, merely removing the impediment of the statute. In the case on hand, the legislature not only removes the legal impediment contained in the will, which prevents the executors from selling before the death of Daniel, but also annihilates the provision of the will that the executors shall rent out the land and pay the rents and profits to Daniel during his life, and takes from the sons of the testator the probable increase of the land during Daniel's life, and the privilege of taking it as land at his death. By what warrant may they do all this? Not by the power of a judicial decree, because the legislature have no judicial power. And that is not legislation which adjudicates in a

particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of Government."

Ervine's Appeal, 16 Penna. Rep., 266.

" * * * What then did the legislature propose by the statute of 1848? This court had ruled in *Asay* v. *Hoover* directly, and in *Barr* v. *Strobell*, *Cavett's Appeal*, and perhaps *Hays* v. *Harden*, incidentally, that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the *name* was written by his express direction, is not a signature required by the act of 1833; and the legislature has declared, in order to overrule it, that 'every last will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid.' How this mandate to the courts, to establish a particular interpretation of a particular statute, can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on a unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, or to enact that white meant black, or that black meant white, would, in the same degree, be an exercise of arbitrary and unconstitutional power."

Greenough v. *Greenough*, 11 Penna. State Rep., 494–495.

The following case emphasizes how important it is that, to preserve the government under which we live, we preserve the distinction the Constitution fixed between the different branches of our Government, and that from

the nature of things the only conservative power to do this is lodged with the Judiciary.

"The opinion of the court was delivered July 15, 1850, by *Gibson, C. J.* If anything is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches it is, the legislative, the executive, and the judiciary, which, within their respective departments are equal and coordinate. Each derives its authority, mediately or immediately, from the people; and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be a despotism—a government of unlimited, irresponsible, and arbitrary rule. It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses to attract their attention.

"From its every position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right is bound to meet every emergency; else causes would be decided not only by the legislature, but sometimes without hearing or evidence. The mischief has not yet come to that, for the legislature has gone

no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment; which is essentially his property, and to subject him to the vexation, risk, and expense of another contest.

"It has become the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small.

"We are bound to say, therefore, that *Braddee* v. *Brownfield* is not law, and that it was erroneously decided. As the act before us is null, the plaintiff ought to have been allowed to proceed on his judgment.

"Order reserved and rule to show cause discharged."

De Chastellux v. *Fairchild*, 15 Penna. State Rep., 20–21.

From Nebraska comes the following well-considered case:

"* * * But section three legalizes 'all contracts and loans made by any corporation or association already formed,' under Chaper XXV of the Revised Statutes of 1866, with any member thereof, and section four defines what 'shall be deemed in law a waiver of anything in such contract or loan that might be deemed usurious, in the same under the laws of this State, at the time the same was made and securities given.' And we are now asked to disregard the vested rights secured to defendant by virtue of the laws under which the contract was made, and to determine the rights of the parties under the act of 1873. To do so would not only give this act a retroactive operation, but it would also give effect to an expository law in which one legislature attempts to interpret the statutes written by another legislature seven years before, and thereby adjudicate upon private rights which had accrued

under the former laws. The law under which the loan was made, not only inhibited the bonus reserved by the plaintiff, but also gave the defendant the right to protect himself against the payment of such usury, and save his vested right under the law, of which the constitutional provision declares he shall not be deprived, and therefore it seems plain that this act of 1873 must be destitute of a retroactive force, not only because it is judicial, but also because it contravenes that provision of the Constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law. It is well understood, as a fundamental principle of our system of government, that the making of statutory laws, and their exposition and application to cases as they arise, are clearly and distinctly two different functions; the former is allotted by the Constitution to the legislature, the latter to the courts.

"Again, the two sections referred to are not in the nature of a declaratory statute, nor are they in the nature of a curative act; but they purport to be an interpretation of former laws, and are substantially in the nature of a mandate to the courts to construe and apply the former laws, not according to judicial, but according to legislative judgment. Can a legislature exercise such judicial authority? By Art. II of the Constitution, the powers of the Government are divided into three distinct departments, 'the legislative, executive, and judicial, and no person or collection of persons, being one of its departments, shall exercise any power properly belonging to either of the others,' except as therein expressly directed or permitted. Hence the powers of the legislature are to enact laws, not to expound them; and the powers of the courts are to interpret the law, declare what it is, and apply it to cases as they arise."

Lincoln Building and Saving Association v. *Graham*, 7 Neb. Rep. 179–180.

The leading case relied upon by appellant to sustain the power of Congress to ratify the assessment and collec-

tion of these duties is *Grim* v. *Wiesenberg*, 57 Pa. St. 433. The opinion of the Court of Claims referring to this case, p. 19, Rec., says:

> "How much the necessities of war may have influenced this decision it is unnecessary to inquire, and it is sufficient to say that Judge Cooley, in his work on Taxation, refers to this case in a note and speaks of another case immediately following it as 'a more doubtful one.' (Cooley on Taxation, 515, Note I, 3d Ed.)"

Several of the strongest cases we have just cited have been Pennsylvania cases. The predicates laid down by Judge Sharswood in this case of *Grim* v. *Wiesenberg's School District*, show that the case comes entirely outside the category of the present case. For instance, he says:

> "If an act of Assembly be within the legitimate scope of legislative power it is not a valid objection that it divests vested rights."
>
> p. 48, Attorney-General's Brief.

Unfortunately, whether Judge Sharswood overlooked the legitimate scope of legislative power in the case he was deciding, or not, it is a fact that the scope of legislative power in reference to the case here for decision does not include the right to violate the Fifth Amendment to the Constitution of the United States, or Section 1, Art. 3 of the Constitution.

Judge Sharswood also says:

> "It has not been pretended and could not be, that the legislature had not the power antecedent to authorize it."
>
> pp. 48–49, Attorney-General's Brief.

In this case, while admitting the right of Congress itself to pass a tariff law for the Philippines, it is contended that Congress did not have power, antecedent to the

exaction of these duties, to authorize the President to make a tariff law for the Philippines and to say what should be the tariff rate there.

The legislation is also unconstitutional, because—

2. The right of these goods to free entry was acquired by treaty, and Congress has no power to do away with that right save by itself fixing a tariff law for the Philippines under the authority conferred upon it by the Constitution.

There is a view of the matter rendering this legislation unconstitutional, which should not be overlooked.

By the treaty which the United States made with Spain whereby the Philippines became territory of the United States, the power of the President to impose duties on goods from the United States at once ceased and the right of free entry until Congress should legislate and impose a tariff on goods from the United States began; and save by the right to itself legislate Congress had no constitutional powers to change the rights acquired by this claimant, under the treaty.

> "The title to the strip of land in controversy having been granted by the United States to the elder chief Moose Dung, by the treaty itself, and having decended upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the Judiciary; and except in cases purely political, Congress has no constitutional power to

settle the rights under a treaty or to affect details already granted by the treaty itself. *Wilson* v. *Wall*, 6 Wall. 83, 89; *Reickart* v. *Felps*, 6 Wall. 160; *Smith* v *Stevens*, 10 Wall. 321, 327; *Holden* v. *Joy*, 17 Wall. 211, 247.

"The Congressional resolution of 1894 and the subsequent proceedings in the Department of the Interior must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief; and the decree is affirmed."

Jones v. *Meecham*, 175 U. S. 32.

The legislation is further unconstitutional, because

3. Congress cannot ratify what in the first place it could not authorize.

When Congress fixes tariff rates and provides the necessary means for levying and collecting taxes it is legislating.

When the Executive undertakes to do the same thing, there can be no doubt but what he is likewise exercising legislative power. His act can have no other construction.

There can be no question but what the President in establishing this tariff was legislating, yet the Constitution provides:

"Art. I, Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

"Art. I, Sec. 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises—to regulate commerce with foreign nations and among the several States."

"Art. IV, Sec. 3, second paragraph. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibilities by chosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Cooley's Constitutional Limitations (7th Ed.), 163.

The case of *Field* v. *Clark*, 143 U. S. 659, 692, referred to frequently in the briefs on these cases, lays down as vital to the integrity and maintenance of our system of government that Congress can not delegate legislative power to the President, and that the true distinction is always between delegation of power to make the law, which necessarily involves discretion as to what the law shall be and conferring merely authority or discretion as to the execution of the law enacted in the first instance by the proper legislative power.

The tariff here levied was made by executive order and fixed by executive discretion and in no other way. This is too plain for argument. There is not a semblance of the executive having merely exercised a discretion as to the execution of a law enacted in the first instance by Congress, the branch of the Government possessing the proper and exclusive power to legislate.

Unless Congress could in the first instance have delegated the power to legislate to the President it could not afterwards constitutionally ratify such legislation. Con-

gress could itself, on April 11, 1899, have legally imposed duties on goods coming from the United States to the Philippines, but because of that, there is no fiction known to the law whereby Congress could have delegated to the Executive its authority to make such a law.

Where there exists no authority to confer power, there can never be any agency. What A in the role of principal could not authorize B to do, if done by B, A can not afterwards ratify.

The Constitution has separated the powers of the legislature from those of the executive. The branch of the Government to which is given legislative power, and the branch to which is given executive power is each supreme within its sphere, but neither can invade the sphere of the other. Each has a course of its own which, if the integrity of our constitutional form of government is to be preserved, and we are to have law and order and not chaos, need to be kept as distinct and separate as the courses of the planets in the heavens.

The leading case relied on by the Government to sustain the power of Congress to ratify the action of the President in having made the law under which these duties were levied, is the case of *Hamilton* v. *Dillin*, 21 Wall. 92. The opinion of the Court of Claims (p. 20, Rec.) tersely disposes of this case as an authority where it says:

> "(1). The tax was held legal without any validating act.
>
> "And
>
> "(2). The tax was also a proper exercise of the military power of the President against an enemy in time of war."

In the case now under consideration the facts are just the reverse of those in *Hamilton* v. *Dillin*. Here

(1). The tax is illegal without any validating act.

And

(2). The tax was not a proper exercise of the military power of the President against an enemy in time of war, having been levied after the war had ended (for which the order was made).

If Congress can ratify the unconstitutional act of the President in one case, it can do so in any case; and the powers of the President become, not what the Constitution has ordained, but what the legislature may will—a condition repugnant to the fundamental principles upon which rests the Republic.

4. Before the passage of the act in question, this court had declared such a law to be unconstitutional.

In the case of *De Lima* v *Bidwell*, 182 U. S. 199, it was insisted that Congress had recognized the right to collect the duties in question by applying under the act of March 24, 1900 (31 Stat. at Large, 51) for the benefit of Porto Rico, the amount of the customs revenue received on importations by the United States from Porto Rico since the evacuation by the Spanish forces October 18, 1898, to January 1, 1900, together with any further customs revenues collected on importations from Porto Rico since January 1, 1900. But this court decided that that act could clearly have no retroactive effect as to moneys theretofore paid under protest, for which an action to recover back had already been brought; and that the right to recover moneys already sued for could not be taken away by a subsequent act of Congress; and that such action would be beyond the power of Congress.

It is the contention of the Government that the following language from *Lincoln* v. *United States*, 202 U. S. 484, reopens the question decided in *De Lima* v. *Bidwell, i. e.*:

> "The statute does not ratify all action or all collections of taxes, as it easily might have done, but

> only actions in accordance with the order. If the order, properly construed, did not purport to apply to vessels unless they were either enemy or foreign, then when a vessel ceased to be foreign the order did not apply, and a tax upon such vessel, not being in accordance with the order, is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (*Hamilton* v. *Dillin*, 21 Wall. 73), still it is not to be presumed to do so in language which literally taken has a narrower sense."

Then referring to the case of *De Lima* v. *Bidwell*, the Court said :

> This affords a special reason for believing that if it (Congress) had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape."

In taking this view, counsel seem to have forgotten that it is the duty of the court to give some meaning to a statute if it can and that the language above quoted was used in a discussion by the court of this duty and in setting forth the meaning that properly belonged to the clause, *i. e.*, that it ratified certain action Congress had the right to ratify, but did not ratify as was contended by the Government, the levying of these duties.

It is both incumbent and appropriate in considering the language now used to pass upon the power of Congress to ratify and we feel assured that with all due respect for the legislative branch of the Government, this court will not hesitate to decide that Congress has exceeded its legislative functions, just as it decided in passing upon the Porto Rican case in *De Lima* v. *Bidwell*.

HILARY A. HERBERT,
BENJAMIN MICOU,
Counsel.

FILE COPY.

Office Supreme Court, U.
FILED.
APR 13 190
JAMES H. McKEN
CL

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 580.

THE UNITED STATES, *Appellant,*

v.

CONRAD HEINSZEN and GUSTAV BROCKMANN trading as Partners under the Firm Name of C. HEINSZEN & CO.

SUPPLEMENTAL BRIEF

Filed for Certain Claimants Having Interests Similar to those of Appellees.

HILARY A. HERBERT,
BENJAMIN MICOU,
Counsel.

IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
CONRAD HEINSZEN and GUSTAV BROCKMANN, trading as Partners under the firm name of C. HEINSZEN & Co., *Appellees*.
No. 580.

SUPPLEMENTAL BRIEF

of Herbert & Micou, — representing Certain Claimants having Interests Similar to those of Appellee.

After the first decision in the *Warner Barnes* case the Government sent up a signal of distress, and asked a rehearing on the question of ratification, representing that that question had not been as fully presented as the Government thought, owing to its importance, it should have been, and for the further reason that the *Lincoln* and *Warner Barnes* cases were test cases involving similar claims for several millions of dollars, then pending in the Court of Claims. The rehearing was granted and the court sustained its former decision. Congress then passed the provision contained in the deficiency appropriation act of June 30, 1906, now here for consideration. The present case at bar was argued orally in the court below

by the Assistant Attorney-General for the Court of Claims, and he opened the case here. Printed briefs were filed by the Government in the court below and in this court. Following all this and after the opening of the case, the Honorable Solicitor-General suggested in oral argument that a different principle for determining the constitutionality of this legislation from the one applicable in a suit between private individuals applies here because of the sovereignity of the U. S. and the Honorable Attorney-General in his oral argument in closing elaborates this idea. Thus is sent forth what its brilliancy reveals to be another distress signal—and despite the adroitness worthy of the marvellous gift of expression possessed by the Honorable Attorney-General the proposition set forth by him at this late day, when analyzed, only shows how desperate the Government's case must be when it has to seriously take such a position.

The proposition in a nut-shell, is this:

That because the Government can not be sued save by its own permission, that after that permission has been given and while it still stands, claimants do not have the rights to their property, illegally taken and held by the sovereign, that they would have if such property had been similarly taken and held by a private individual; that constitutional protection can not be invoked and rights of plaintiffs have no firmer setting, in justice or equity, than before permission to sue the sovereign was granted. In effect that there are no rights, but only privileges, which rest, if upon anything, only upon the arbitrary basis of a smile or a frown. The Legislature needs but to nod, and the gracious privilege is gone. In fact even a nod is not necessary. This designated privilege is a will-o'-the-wisp which goes or comes at the beck and call of the sovereign will as expressed through the ingenuity of counsel. This lack of constitutional rights by the claim-

ants before this court is contended for, not on the ground that in these cases the sovereign has withdrawn permission to be sued, but on the ground that because the sovereign has the right to withdraw permission claimants never acquire any rights, and therefore have none to assert.

The argument of the Honorable Attorney-General does not go further than a discussion of the effect of the power of Congress to withdraw its permission to be sued, which permission and all that flows from it he terms privileges. He does not contend that the clause under consideration withdraws permission. He is too able a lawyer to do that. He merely tactfully heads towards the logical conclusion of his argument and drops the reins in the hope that the road may be taken. He does not suggest, or even hint, and on sober thought the idea is not to be entertained, that the provision, the constitutionality of which is in question, has taken from the Court of Claims jurisdiction in this class of cases. Yet his argument has no applicability whatever here unless it should be followed that far, and even then would not be applicable from the view of having taken away a right, but merely from the viewpoint of having taken away a remedy.

Where jurisdiction fails pending cases fall with it, whether such cases be suits against the Government or against individuals; but that has nothing whatever to do with the rights of litigants where jurisdiction attains.

At page 46 of the Government's brief, and discussing the power of Congress to ratify, it is said:

> "This is not an attempt to lay a tax which Congress now thinks ought to have been imposed six or seven years ago, but to ratify and legalize a tax collected then upon authority which all parties interested, tax payer and tax collector alike thought at that time to be legal."

This presents the Government's position, deliberately expressed, and what it styles an attempt to ratify and legalize a tax can not be distorted into an intention by Congress to repeal the applicability of the general jurisdiction clause of the Court of Claims to this special class of cases, and also the further provision from the Revised Statutes:

> "Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such governments in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."
>
> Revised Statutes, section 1068.

Withdrawal of jurisdiction that has once attached, whether to bring suits against the Government or against private individuals, could never be inferred from an attempt of the legislature either to itself exercise judicial powers or to interfere with the courts in the exercise of a continuing jurisdiction. Congress can give jurisdiction, and it can take it away over all subjects within its constitutional powers as well as over the subject of suits against the sovereign, but while the courts are open, are free agents and their jurisdiction attains Congress can not determine for the courts how they are to decide cases or the construction they are to put upon acts long since transpired from which rights have accrued.

Congress can cast an additional excise tax upon property that has already paid an excise tax, where, as in the case of *Patton* v. *Brady*, 184 U. S. 608, an additional excise tax had been placed upon articles which were at the time of the passage of the act, held and intended for sale.

The improperly designated tax exacted in this case

some six years ago was a payment made to secure the entries of merchandise into the ports of the Philippine Islands.

Importation is an act completed when merchandise has passed the customs and entered the country and a custom duty is a tax upon this privilege of entry.

Some of the merchandise brought into the Philippines was drinkables and eatables and no doubt long since consumed. Whether six years after the privilege had been exercised and the merchandise released and that not consumed gone, it is not known where, Congress could legally impose a tax upon the right of entry and enforce the same, not against the merchandise itself or whoever might now own it, where still in existence, but against the parties who originally entered the merchandise six years before and who are not now the possessors and owners thereof, presents a very different question from the one presented in the case of *Patton* v. *Brady supra.* It would also present the question of whether Congress could impose a tax on the privilege of importing where the importer at the time he exercised the privilege had had no notice of any such tax or any option as to whether he would subject himself to it.

But neither the question presented by that case nor the question that we have supposed, is the question here. Congress is not attempting to impose a tax now upon the privilege of having imported six years ago, but is attempting to legalize and ratify collections which when exacted were never taxes at all. What is attempted, and this is admitted, going by the statement from the Government's brief quoted above, is not to levy a tax which Congress now thinks ought to have been imposed six or seven years ago, but to ratify and legalize a collection made then.

As to this collection having been a tax, we of course

differ with the counsel for the Government. But the statement referred to shows the disclaimer by the Government of the idea that the present provision is an attempt to now lay a tax retroactively; and the question here is not whether Congress can impose retroactively an excise tax, but whether it can say for this court that that is a tax which the court has declared was no tax, and compel the acceptance of its fiat over the adjudged decision of this question in the *Lincoln* and *Warner Barnes* cases; which cases, as set forth by the Government in its petition for a re-hearing, were test cases involving similar claims then pending in the Court of Claims.

Mr. Justice Harlan in the case of *Koshkonong* v. *Burton*, 104 U. S. 668, quoted from in our first brief, held that an adjudication by the highest judicial tribunal of a State prior to the passage of the enactment relied upon to give retroactive effect at variance with what had been decided by the court, was an adjudication as to what was the law for that entire class of cases, which the legislature could not over-ride.

That to sue the sovereign requires permission none will deny, and in the only phase of that requirement applicable here permission is necessary to sue anyone. In other words, before suits can be brought there must be courts with jurisdiction to determine such suits, and in courts to which jurisdiction has never attained, or from which jurisdiction has been taken away, suits must fall, not because there is no right, but merely because there is no remedy. When permission is given to sue the Government, like where permission to sue is given against any other defendant, by the granting of jurisdiction over the parties and the subject-matter, it is spinning too fine to claim that the potency of sovereignty can turn rights into privileges. The permission which flows from jurisdiction gives, in a suit against the Government, the

same constitutional rights and protection to the plaintiff as are given to A as against B, where the courts have jurisdiction of A's suit; and those rights and that protection are perfect as long as the jurisdiction lasts; and such jurisdiction should not be held to be withdrawn by language any less clear as to its intent, than is the language by which the jurisdiction was bestowed.

It was earnestly and seriously contended by the Honorable Attorney-General that a chose in action as against the Government did not vest the same right as a chose in action against an individual, because of the necessity to have permission from the sovereign before you could sue. We think that what has just been said disposes of this contention, but it may be as well to emphasize what is claimed here.

That is, that this money we are claiming is not the Government's money at all but ours, and the legal title is vested in us. This is the clear status of the matter from the *Lincoln* and *Warner Barnes* cases. The courts are open to us. There is no question of the jurisdiction of the Court of Claims or of this court, and if by legislative fiat the title to this property is to become vested in the Government, then we are to be deprived of that property without due process of law as that term is applicable in judicial proceedings, and what is our property, and has been so adjudged in a test case to determine this class of cases, is to be devoted to the public use without any just compensation. We believe that a chose in action to be clearly such a valuable kind of personal property as should not be taken away without due process of law. The court has held a right of action to be property, in the case of *Angele* v. *Chicago, St. P., M. & O. Ry. Co.* 151 U. S. 138.

HILARY A. HERBERT,
BENJ. MICOU,
Counsel.

Supreme Court of the United States.

No. 580.—October Term, 1906.

The United States, Appellant, vs. Conrad Heinszen & Gustav Brockmann, trading as partners under the firm name of C. Heinszen & Company. } Appeal from the Court of Claims.

[May 27, 1907.]

Mr. Justice White delivered the opinion of the Court.

In an endeavor to clarify the consideration of this controversy we invert somewhat the order in which the facts have been stated in the findings below and refer to previous rulings of this court pertinent to the subject in hand, besides supplementing the same by a reference to relevant matters of public history, of which we take judicial notice.

After the Philippine Islands came under the military control of the United States the President, on July 12, 1898, issued an order providing for the enforcement by the military power in those islands of a system of tariff duties. This order, promulgated by the Secretary of War, was accompanied with an enumeration of the tariff proposed and regulations for the collection of the same. However, for causes which need not be referred to, the tariff in question was subsequently modified and did not go into operation until November, 1898.

The duties imposed by this tariff were levied on goods coming into the Philippine Islands, whether from the United States or other countries. This tariff was in force when the treaty of peace was signed (December 10, 1898), when the treaty was ratified (April 11, 1899), and was continued by the Philippine Commission appointed by the President in April, 1900. Indeed, the civil government, as established in the islands by the President, either in virtue of his inherent authority or as a result of the power recognized and conferred by the act of Congress, approved March 2, 1901, (31 Stat. L. 910,) continued the original tariff in force, except as to some modifications not material to be noticed, and formulated its provisions in the shape of a legislative act entitled "An act to revise and amend the tariff laws of the Philippine Archipelago." And this tariff was in force in March, 1902, when it was expressly approved and continued by Congress. (32 Stat. 54.)

In December, 1901, the cases of *De Lima* v. *Bidwell* and *Dooley* v. *United States* were, by this court, decided. (182 U. S. 1, 222.) The first case involved the right to recover duties paid under protest to the collector of the port of New York upon sugar brought into the United States from the island of Porto Rico during the autumn of 1899 and subsequent to the cession of the island. The second case involved the right to recover the amount of certain duties on goods carried into Porto Rico from the United States between July 6, 1898, and May 1, 1900, the duties in question having been levied by authority of the general in command of the army of occupation or subsequently by order of the President as commander-in-chief. In the first case (*De Lima* v. *Bidwell*) it was decided that, as the effect of the ratification of the treaty was to take the island of Porto Rico out of the category of foreign territory within the meaning of that word as used in existing tariff laws of the United States, no right remained to enforce, against goods coming from Porto Rico into the United States, the previously enacted tariff of duties, although, considering the terms of the treaty and the relation of the island to the United States, Congress had power to impose a tariff on goods coming from that island into the United States. As a corollary of the doctrine announced in *De Lima* v. *Bidwell*, in the second case (*Dooley* v. *The United States*) it was held that whilst the President, as commander-in-chief, had authority to impose tariff duties in Porto Rico on goods coming into that country from the United States prior to the ratification of the treaty, no such executive power existed after that ratification. It was consequently held that none of the duties paid prior to the ratification of the treaty could be recovered, whilst those paid subsequently could be.

In the following year (December 2, 1901) another case, entitled *Dooley* v. *The United States*, was decided. (183 U. S. 151.) That case involved the validity of tariff duties levied in Porto Rico on goods brought into that island from the United States, the duties in question having been imposed after the ratification of the treaty and in and by virtue of the act of Congress known as the Foraker Act. Applying the principles announced in the previous cases just referred to, it was held that the duties were lawful because, although collected after the ratification, they were imposed not simply by virtue of the authority of the President, acting under the military power, but in conformity to a valid act of Congress.

And on the same day with the foregoing the case of *Fourteen Diamond Rings* was decided. (183 U. S. 176.) That case involved the validity of tariff duties levied on diamond rings brought from the Philippine Islands into the United States. Adhering to the doctrines settled by the prior rulings, it was held that, as the Philippine Islands, by the ratification of the treaty, had ceased to be foreign within the meaning of the tariff laws, the imposition of the duties complained of was unlawful. In the course of

the opinion the effect of the treaty as applied in the previous cases to Porto Rico was pointed out, and the status of the Philippine Islands in virtue of the treaty was, in effect, held to be controlled by the former decisions.

In April, 1905, the two cases of *Lincoln* v. *The United States* and *Warner, Barnes & Co., Limited,* v. *The United States* were by this court decided. (197 U. S. 419.) The cases came here, one on error to the District Court of the United States for the Southern District of New York, and the other by appeal from the Court of Claims. The one (Lincoln case) was commenced on March 29, 1902; the other (Warner, Barnes & Co. case) on January 17, 1902. In both cases recovery from the United States was sought of the amount of duty paid upon goods taken from the United States into the Philippine Islands after the ratification of the treaty with Spain and before the passage of the act of Congress of March 8, 1902. Reversing the judgments which had been rendered below in both cases in favor of the United States, it was declared that there was nothing in the situation of the Philippine Islands which took that territory out of the reach of the doctrine announced in the previous cases which we have reviewed, and it was therefore decided that the President was without power, after the ratification of the treaty, in the absence of express authority from Congress, to impose the tariff duties in question. A contention on the part of the United States that Congress by the second section of the act approved July 1, 1902, (entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,") had ratified the action of the President in imposing and collecting the duties in controversy, therefore no recovery could be had, was held to be unfounded, for grounds stated in the opinion, to which we shall hereafter advert. The case was heard upon rehearing, and in a decision announced on May 28, 1906, the views previously entertained by the court were reiterated and adhered to. (202 U. S. 484.) In the month following (June, 1906) Congress passed an act containing a provision which reads as follows (34 Stat L. 636):

"That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two, at all ports and places in said islands, upon all goods, wares, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed."

Now this case was commenced, after the decision in the *Fourteen Diamond Rings,* to recover the amount of tariff duties exacted in the Philippine

Islands on merchandise brought from the United States, the duties having been collected under the authority of the order of the President after the ratification of the treaty, but before the time when Congress, by section 1 of the act of March 8, 1902, had enacted tariff duties for the Philippine Islands. The case was pending in the Court of Claims when the Lincoln and Warner, Barnes & Co. cases were decided by this court. It was found by the court below that the military officers of the United States collected the duties and paid over the amount thereof to the treasurer of the Philippine Islands, and that the money was disbursed for the expenses of that government without going into the Treasury of the United States. Considering that the original illegality of the duties complained of was established by the previous decisions of this court, and that the act of Congress of June 30, 1906, ratifying the collection of duties was beyond the power of Congress to enact, the court below rendered judgment against the United States for the amount of duties paid. (Ct. Cls. .)

Applying the doctrine settled by this court in the cases to which we have referred, concerning the power to levy tariff duties under the authority of the President, on goods taken from the United States into Porto Rico and the Philippine Islands, or brought into the United States from either of such countries subsequent to the ratification of the treaty and prior to the levy by Congress of tariff duties, it is obvious that the court below correctly held that such tariff exactions were illegal. It follows therefore that the only question open for consideration is whether the court below erred in refusing to give effect to the act of Congress of June 30, 1906, which ratified the collection of the duties levied under the order of the President.

As the text of the act of Congress is unambiguous and manifests as explicitly as can be done the purpose of Congress to ratify, the case comes to the simple question whether Congress possessed the power to ratify which it assumed to exercise. When the controversy is thus reduced to its ultimate issue we think the error committed by the court below, both in reason and authority, is readily demonstrable.

That where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, State governments or municipal corporations, is also elementary. We shall not stop to review the whole subject or cite the numerous cases contained in the books dealing with the matter, but content ourselves with referring to two cases as to the power of Congress, which are

apposite and illustrative. In *Hamilton* v. *Dillin*, (21 Wall. 73,) the facts were as follows: During the Civil War the Secretary of the Treasury, with the sanction of the President, adopted rules and regulations for granting permits to trade between the belligerent lines. One of these rules exacted the payment of a contribution, styled a fee, of four cents a pound on cotton purchased. Hamilton having taken a permit and paid Dillin, surveyor of the port of Nashville, Tennessee, under the regulations, a sum of money for a permit to trade in cotton, sued to recover the same as having been illegally exacted. In deciding the case (p. 88) the court came to consider whether "the action of the Executive was authorized, or, if not originally authorized, was confirmed by Congress." Both these questions were determined in the affirmative. When the court came to consider the legislation relied upon as having confirmed the acts of the President in establishing the regulations in question, after stating the same the court declared, "We are also of opinion that the act of July 2, 1864, recognized and confirmed the regulations in question." *Mattingly* v. *The District of Columbia*, (97 U. S. 687,) concerned the validity of an act of Congress in effect confirming the doings of the board of public works of the District of Columbia touching the improvement of streets and roads and ratifying certain void assessments for street improvements. The court said (p. 690):

"We do not propose to inquire whether the charges of the bill are well founded. Such an inquiry can have no bearing upon the case as it now stands; for were it conceded that the Board of Public Works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainant's property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been Congressional legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the District, which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had power to commit to the board the duty of making the improvements, and the power to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*' Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. *Cohen* v. *Virginia*, 6 Wheat. 264. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."

It is then evident, speaking generally, both on principle and authority, that Congress had the power to pass the ratifying act of June 30, 1906, and that that act bars the plaintiff's right to recover, unless by the application of some exception this case is taken out of the operation of the general rule. And this brings us to consider the several propositions relied upon at bar to establish that such is the case.

First. Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is yet urged that as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not by ratification make valid the exercise by the President of a legislative authority which could not have been delegated to him in the first instance. But the premise upon which this proposition rests presupposes that Congress in dealing with the Philippine Islands may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select, a proposition which is not now open for discussion. (*Dorr* v. *United States*, 195 U. S. 133.)

Second. As the duties collected were illegal, it is insisted that for the purpose of testing the validity of the act of Congress the fact of such collection must be put out of view, and the act ratifying the exaction must be treated as if it were solely an original exercise by Congress of the taxing power. This being done, it is said, reduces the case to the inquiry, Had Congress power, years after goods which were entitled to free entry had been brought into the Philippine Islands, to retroactively impose tariff duties upon the consummated act of bringing the goods into that country? But the proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States. Indeed the contention goes further even than this, since it entirely disregards the important consideration that although the duties were illegally exacted the illegality was not the result of an inherent want of power in the United States to have authorized the imposition of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity to his conduct in enforcing the payment of the duties. And when these misconceptions are borne in mind it results that the unsoundness of the proposition relied upon is demonstrated by the application of the elementary principle of ratification to which we have previously referred. Moreover, the fallacy which the proposition involves becomes yet more obvious when it is observed that the contention cannot even be formulated without misstating the nature

of the act of Congress; in other words, without treating that act as retrospective legislation enacting a tariff, when on its very face the act is but an exercise of the conceded power dependent upon the law of agency to ratify an act done on behalf of the United States which the United States could have originally authorized.

Third. It is urged that the ratifying statute cannot be given effect without violating the Fifth Amendment to the Constitution, since to give efficacy to the act would deprive the claimants of their property without due process of law, or would appropriate the same for public use without just compensation. This rests upon these two contentions: It is said that the money paid to discharge the illegally exacted duties after payment, as before, "justly and equitably belonged" to the claimants, and that the title thereto continued in them as a vested right of property. It is consequently insisted that the right to recover the money could not be taken away without violating the Fifth Amendment, as stated. But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify. To hold to the contrary would be to say that whilst the unauthorized act of an officer done on behalf of the United States was subject to ratification by the United States, yet if the officer acted without authority the act when performed annihilated the power to ratify; that is, that the very condition which engendered the power destroyed it.

But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (vol. 2, pp. 415, 416):

"The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. (*Goshen* v. *Stonington*, 4 Conn. 209; *Wilkinson* v. *Leland*, 2 Peters, 627; *Langdon* v. *Strong*, 2 Vermont, 234; *Watson* v. *Mercer*, 8 Peters, 88; 3 Story's Comm. on the Constitution, 267.)"

Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded

that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):

"Nor is it important, in any of the cases to which we have referred, that the legislative act, which cures the irregularity, defect or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision; (*Bacon* v. *Callender*, 6 Mass. 303; *Butler* v. *Palmer*, 1 Hill, 324; *Cowgill* v. *Long*, 15 Ill. 202; *Miller* v. *Graham*, 17 Ohio St. 1; *State* v. *Squires*, 26 Iowa, 340; *Patterson* v. *Philbrook*, 9 Mass. 151,) and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. (*Watson* v. *Mercer*, 8 Pet. 88; *Mather* v. *Chapman*, 6 Conn. 54; *People* v. *Supervisors &c.*, 20 Mich. 95; *Satterlee* v. *Matthewson*, 16 S. & R. 169, and 2 Pet. 380; *Excelsior Mfg. Co.* v. *Keyser*, 62 Miss. 155; *Phenix Ins. Co.* v. *Pollard*, 63 Miss. 641; *McLane* v. *Bonn*, 70 Iowa, 752, 30 N. W. 478; *Johnson* v. *Richardson*, 44 Ark. 365. . . .)"

And the following cases, in various forms, illustrate the application of the principle: *United States* v. *Morris*, 10 Wheat. 246; *Grim* v. *School Dist.*, 57 Penn. St. 433, 438; *City of Chester* v. *Black*, 132 Pa. St. 568; *Price* v. *Huey*, 22 Ind. 18; *Welch* v. *Wadsworth*, 30 Conn. 149, 158; *Rich* v. *Flanders*, 39 N. H. 310–311; *Iowa Railroad Land Co.* v. *Soper*, 39 Iowa, 112, 119; *Ferry* v. *Campbell*, 110 Id. 290; *Mills* v. *Geer*, 111 Georgia, 275, 279, 287, 288.

Fourth. Aside, however, from principle and the general result of the adjudged cases, it is finally insisted that the want of power in Congress to ratify the collection of the duties in question under the circumstances here disclosed conclusively results from the decision in *De Lima* v. *Bidwell*, (182 U. S. 1.) As we have seen, that case concerned the validity of collections of duties in the port of New York on goods brought into the United States from Porto Rico, and whilst insisting on the legality of the duties, the Government at the same time urged that, even if originally invalid, they had yet been ratified as the result of provisions of a specified act of Congress which had been passed after the suit to recover the duties had been commenced. As that portion of the duties sued for which had been collected after ratification of the treaty were decided to be illegal, it followed that a decision as to the question of ratification was required. In passing upon the subject, after intimating doubt as to whether the act relied upon,

as manifesting the intention of Congress to ratify, was intended to have that effect, it was remarked (p. 199):

"It can clearly have no retroactive effect as to moneys theretofore paid under protest, for which an action to recover back had already been brought. As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. In any event, it should not be interpreted so as to make it retroactive. (*Kennett's Petition*, 24 N. H. 139; *Alter's Appeal*, 67 Penn. St. 341; *Norman* v. *Heist*, 5 W. & S. 171; *Donovan* v. *Pitcher*, 53 Ala. 411; *Palairet's Appeal*, 67 Penn. St. 479; *State* v. *Warren*, 28, Md. 338.)"

Now, considering the language just quoted in connection with the doubt expressed as to the import of the alleged ratifying statute, it results that the reasoning employed stated two considerations, first, the want of power in Congress to ratify after suit brought; and second, the duty of construing the statute relied upon so as not to produce ratification, in view of its ambiguity. As the question of construction was last stated and that question was declared to be "in any event" decisive, we think the observations made concerning the want of power to ratify after suit brought must be regarded as not having been necessary to the decision rendered, and therefore must be treated as obiter. And this interpretation was, we think, applied in the cases of *Lincoln* v. *United States* and *Warner, Barnes & Co.* v. *United States, supra.* In those cases, as we have said, one of the defenses insisted upon by the Government was a ratification alleged to have been operated by the act of Congress of July 1, 1902, which was passed after the bringing of the actions to recover. It is patent on the face of the opinion announced on the original hearing that the decision was exclusively based upon the ground that the act of Congress was so ambiguous concerning the ratification relied upon that it should not be implied that such ratification was contemplated. And it is to be observed that *De Lima* v. *Bidwell* was not overlooked, since that case was referred to in the course of the opinion. On the rehearing the case was argued on questions submitted by the court, viz., whether the act relied upon manifested the purpose to ratify, and if it did, whether Congress had power so to do. In the opinion on the rehearing, while the court reiterated the view previously expressed, that the act could not be treated as ratifying the collection of the duties sought to be recovered because of its ambiguity in that regard, yet it expressly recognized the power in Congress to ratify, and in effect declared that as to those things to which the alleged ratifying act clearly applied ratification had resulted. This is so, since in

the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it was held applicable to the particular duties in controversy, it was pointed out (p. 499) that there were duties which had been levied and collected other than those in controversy to which the act clearly applied, and "that question (as to them) was put at rest by this ratification." Further, in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the passage of the ratifying act lent cogency to the view that if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the court said (p. 498):

"This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted, *Hamilton* v. *Dillin*, 21 Wall. 73, still it is not to be presumed to do so on language which, literally taken, has a narrower sense."

Certainly, this language, particularly in view of the reference made to *Hamilton* v. *Dillin*, is wholly incompatible with the conception that the observation as to pending actions made in *De Lima* v. *Bidwell* was to be taken as having settled the proposition that a power to ratify which otherwise obtained could not be exerted after suit brought.

Be this as it may, however, as after deliberate consideration we are of opinion that the mere bringing of this action did not deprive Congress of its power to ratify the collections made by its officers in the name of the United States of the moneys sought to be recovered in this action, we may not allow the remarks made in *De Lima* v. *Bidwell* under the circumstances stated to control our judgment.

There was much discussion at bar concerning whether the payments of the duties were voluntary. As it would seem that the circumstances surrounding these payments were substantially like unto those existing in the Lincoln and Warner, Barnes & Co. cases, in which the opinions of the court made no reference to the question of voluntary payment, we have concluded to pass that question by, as our conclusion on the subject of ratification disposes of the controversy.

Reversed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

Mr. Justice MOODY took no part in the decision of the cause.

Mr. Justice HARLAN concurring:

By the act of 1906, 34 *Stat.* 636, Congress legalized, ratified and confirmed, as fully to all intents and purposes as if the same had by prior act been specfically authorized and directed, the collection of all duties, both import and export, imposed by the authorities of the United States or of the provisional military government in the Philippine Islands, prior to March 8th 1902, at all parts and places in said Islands, from the United States or from foreign countries. Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the collector, if his exaction of the duties in question was without authority of law. Upon this ground alone, and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal.

True copy.

Test:

Clerk Supreme Court U. S.